EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES S. McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES S. McKNIGHT,

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vs.

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Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

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Los Angeles, California.

For Plaintiff and Appellee:

PEIRSON M. HALL, Esq.,

United States Attorney,

CHARLES H. CARR, Esq.,

Assistant United States Attorney,

Federal Building,

Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 11654-M
	)	
JAMES S. McKNIGHT, et al,	)	
	)	
Defendants.	)	

STATEMENT OF DOCKET ENTRIES UNDER RULE IV,

SUPREME COURT OF THE UNITED STATES

1. Indictment for violation of Sections 37 and 212, Federal Penal Code (18 USC 88 and 335), filed September 6, 1933.

2. Defendant arraigned, September 11, 1933.

3. Plea in abatement filed September 11, 1933.
   Plea in abatement overruled September 21, 1933.
   Demurrer to indictment filed September 22, 1933.
   Demurrer to indictment overruled September 27, 1933.

4. Trial by Jury, December 14, 18, and 19, 1934.

5. Verdict of Guilty on all four of the counts of the indictment, December 19, 1934.

6. Sentence of defendant: on 1st count, be imprisoned in Los Angeles County Jail sixty (60) days, and pay unto the United States a fine of $500.00 and stand committed to said jail until payment of said fine, and on the 2d, 3d, and 4th counts, be imprisoned in Los Angeles County Jail for a term of six (6) months on each count, concurrently, and execution of sentence on said 2d, 3d, and 4th counts suspended for a period of two years on probationary conditions.

Attest DEC 21 1934

R. S. Zimmerman, Clerk U. S. District Court, Southern District of California

By Edmund L. Smith Deputy

No. 11654 - M Filed

Viol: Sections 37 and 212 Federal Penal Code (18 USC 88 and 335).

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the first Monday of February in the year of our Lord one thousand nine hundred thirty-three:

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oath present:

That

JAMES S. McKNIGHT,
BLEY STEIN, and
ROBERT E. TAYLOR,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: prior to the dates of the commission of the overt acts hereinafter set forth, and continuously thereafter to and including the date of finding and presentation of this indictment, in the County of Los Angeles, state, division and district afore-

said, and within the jurisdiction of the United States and of this Honorable Court, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with Lee Ringer, hereinafter called co-conspirator, but not a defendant herein, and with divers other persons whose names are to the grand jurors unknown, to commit an offense against the United States of America and the laws thereof, the offense being to deposit and cause to be deposited in the United States mails for transmission thereby to other persons postal cards and post cards upon which is delineated, written or printed epithets, terms and language that is libelous, scurrilous and defamatory and that is calculated by the terms and manner and style of display and obviously intended to reflect injuriously upon the character and conduct of another, to-wit: one Stephen W. Cunningham, in violation of Section 335, Title 18 United States Code.

And the grand jurors aforesaid, upon their oath aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court:

1. That on or about the 10th day of May, 1933, at Los Angeles, California, defendant, JAMES S. McKNIGHT, had a conversation with defendant BLEY STEIN concerning the subject matter to be sent through the mails on postal cards.

2. That on or about the 12th day of May, 1933, at Los Angeles, California, defendants, JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR opened and caused to be opened a bank account at the Seaboard National Bank, Wilshire and La Brea Branch, in the name of L. Simmons.

3. That on or about the 14th day of May, 1933, at Los Angeles, California, defendants JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR caused to be purchased about thirty thousand (30,000) United States Government postal cards which postal cards carried prepaid postage.

4. That on or about the 15th day of May, 1933, JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR, at Los Angeles, California, addressed and caused to be addressed said postal cards.

5. That on or about the 22nd day of May, 1933, at Los Angeles, California, defendants JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR mailed and caused to be mailed great numbers of postal cards, on each of which was Printed the following:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed .... and believe that Stephen W. Cunningham, candidate for council from the third district, is the "Graduate Manager" of the University of California at Los Angeles. In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mismanagement of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE.
University of California at Los Angeles
215 West 7th Street"

6. That on or about the 15th day of May, 1933, at Los Angeles, California, defendants JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR purchased and caused to be purchased about thirty thousand (30,000) cards.

7. That on or about the 17th day of May, 1933, at Los Angeles, California, defendants JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR secured and caused to be secured a permit to mail third class matter in the name of the Alumni Protest League.

8. That on or about the 15th day of May, 1933, at Los Angeles, California, defendants JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR had said cards printed in accordance with the regulations of the Post Office Department for mailing as permit matter and with the following message printed on the reverse side thereof:

"DEFEAT CUNNINGHAM FOR COUNCIL

His only qualification as candidate appears to be his association with the University of California at Los Angeles

WE PROTEST Inasmuch as that association has not been a happy one, we are appealing to you to defeat this man who depleted our student body finances, and now seeks public office! U. C. L. A.

MISMANAGER CUNNINGHAM

HERE ARE THE FACTS:

7,000 U. C. L. A. STUDENTS
$126,000 DEFICIT

Cunningham was dismissed as manager of student affairs when the student body found itself without funds . . . and facing a deficit of $126,000.00.

IT TOOK 9 YEARS
TO DO IT
GOD HELP THE
TAXPAYERS IF
HE'S ELECTED
COUNCILMAN

We object to his attempt and that of his political backers to capitalize upon the dignity and good name of U. C. L. A.

ALUMNI PROTEST LEAGUE
University of California at Los Angeles"

9. That on or about the 16th day of May, 1933, at Los Angeles, California, defendants JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR addressed and caused to be addressed cards prepared for mailing as post cards.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 22nd day of May, 1933, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously deposit and cause to be deposited for mailing and delivery in the Post Office Establishment of the United States, a certain postal card with the proper postage thereon prepaid, addressed to "Mrs. S. J. Thompson, 423 North Spaulding Avenue, City", which said postal card, when so deposited and caused to be deposited as aforesaid, had delineated, written and printed thereon epithets, terms and language that was libelous, scurrilous and defamatory of and concerning one Stephen W. Cunningham, and which was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, and which was intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, which said matter delineated, printed

and written upon the said postal card was in words and figures following, to-wit:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed ... and believe that Stephen W. Cunningham, candidate for council from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

"In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mis-management of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE
University of California at Los Angeles
215 West 7th Street

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 22nd day of May, 1933, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the

United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously deposit and cause to be deposited for mailing and delivery in the Post Office Establishment of the United States, a certain postal card with the proper postage thereon prepaid, addressed to "Mrs. J. L. Parker, 1319 Holmsby Avenue, City", which said postal card, when so deposited and caused to be deposited as aforesaid, had delineated, written and printed thereon epithets, terms and language that was libelous, scurrilous and defamatory of and concerning one Stephen W. Cunningham, and which was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, and which was intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, which said matter delineated, printed and written upon the said postal card was in words and figures following, to-wit:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed ..... and believe that Stephen W. Cunningham, candidate for council from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

"In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mis-management of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE,
University of California at Los Angeles
215 West 7th Street."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 22nd day of May, 1933, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court did knowingly, wilfully, unlawfully and feloniously deposit and cause to be deposited for mailing and delivery in the Post Office Establishment of the United States, a certain postal card with the proper postage thereon prepaid, addressed to "Mrs. A. M. Meinell, 1628 Federal Avenue, City", which said postal card, when so deposited and caused to be deposited as aforesaid, had delineated, written and printed thereon epithets, terms and language that was libelous, scurrilous and defamatory of and concerning one Stephen W. Cunningham, and which was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of said Stephen W. Cun-

ningham, and which was intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, which said matter delineated, printed and written upon the said postal card was in words and figures following, to-wit:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed .... and believe that Stephen W. Cunningham, candidate for council from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

"In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mis-management of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE.
University of California at Los Angeles
215 West 7th Street

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JAMES S. McKNIGHT, BLEY STEIN and ROBERT E. TAYLOR, hereinafter called the defend-

ants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 22nd day of May, 1933, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously deposit and cause to be deposited for mailing and delivery in the Post Office Establishment of the United States, a certain postal card with the proper postage thereon prepaid, addressed to "West Eichen, 840 South Bedford Street, City" which said postal card, when so deposited and caused to be deposited as aforesaid, had delineated, written and printed thereon epithets, terms and language that was libelous, scurrilous and defamatory of and concerning one Stephen W. Cunningham, and which was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, which said matter delineated, printed and written upon the said postal card was in words and figures following, to-wit:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed .... and believe that Stephen W. Cunningham, candidate for council from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mis-management of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE
University of California at Los Angeles
215 West 7th Street

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

PEIRSON M. HALL
UNITED STATES ATTORNEY
Wm. Fleet Palmer
ASSISTANT UNITED STATES ATTORNEY

[Endorsed]: A true bill. Chas. Byler, Foreman. Filed Sep. 6-1933 R. S. Zimmerman, R. S. Zimmerman, Clerk.

[Title of Court and Cause.]

DEMURRER

And the said James S. McKnight and Robert E. Taylor, by Otto Christensen, their attorney for the especial purpose of presenting their demurrer, come into court here, and having heard the indictment in the above entitled cause read, say that the indictment, and each and every count thereof, and the matters therein contained in the manner and form as the same are stated and set forth therein, are not sufficient in law, and that they, the said James S. McKnight and Robert E. Taylor, are not bound by the law of the land to answer the same, and this they are ready to verify.

WHEREFORE, for want of sufficient indictment in this behalf, the said defendants James S. McKnight and Robert E. Taylor, and each of them, pray judgment that by the court here they, and each of them, may be dismissed and discharged from the premises in the said indictment specified.

And the said James S. McKnight and Robert E. Taylor assign the following grounds of demurrer to said indictment, and to the several counts thereof, and to each and every averment therein that purports to charge an offense against the United State to-wit:

1. That the said indictment and each count thereof does not state facts sufficient to charge the said defendants, or either of them,

(a) With having committed any crime or offense against the United States of America;

(b) The matters and things alleged in each and every count of said indictment do not constitute an offense against the laws of the United States of America.

2. That the said indictment, and each and every count thereof, in the manner and form as the same are therein set forth and stated, is not sufficient at law to constitute a public offense against the United States, under the provisions of Title 18, Sec. 335, U. S. C., or under the provisions of Title 18, Sec. 88, U. S. C., in that:

The matters therein alleged to have been deposited for mailing or delivery are not upon their face libelous, scurrilous, defamatory and calculated to and obviously intended to reflect injuriously upon the character and conduct of the said Stephen W. Cunningham.

3. That the said indictment, and each and every count thereof, is double and multifarious and presents several separate and distinct alleged offenses in one and the same indictment, and each of said counts.

4. That said defendants are not in or by said indictment, or in any count thereof, informed of the nature and cause of the accusation against them, or either of them, or thereby given reasonable notice of the specific charges against them, or either of them, whereby they, or either of them, may properly prepare their defense; that the prosecution thereunder is in violation of, and repugnant to, the provisions of the Sixth Amendment to the Constitution of the United States.

5. That the allegations in each and every count of the indictment are so general, vague and indefinite as not to inform the defendants, or either of them, of the nature and cause of the accusations made therein, proof of the

ultimate acts, matters or things to be offered in evidence in support of said accusations, or to safeguard said defendants, or either of them, against a second prosecution for the same offense.

6. That said first count thereof, and the matters therein contained, in the manner and form as the same are therein set forth and stated, are insufficient and bad in law, in that said count fails to allege, in accordance with the provisions of said Sec. 335, Title 18 U. S. C., that the "postal cards and postcards" were deposited in the United States Mails "for mailing or delivery".

7. That said first count thereof, and the matters therein contained, in the manner and form as the same are therein set forth and stated, are insufficient and bad in law, in that said count I charges the object of the conspiracy to be the depositing of "postal cards and postcards" in the United States Mails upon which appeared prohibited matter, but failing to allege that said "postal card and postcard" were not enclosed in an envelope.

8. That said Count I is bad and insufficient in law, in that said Sec. 335, Title 18, U. S. C. does not prohibit the mailing of "postcards" containing prohibited matter unless said "postcard" is exposed and/or unenclosed in an envolope, and said Count fails to allege that the "postcards" were deposited, and that it was the object of said conspiracy to deposit "postcards" containing prohibited matter for mailing or delivery unenclosed in envelopes.

9. That said first count of said indictment is duplicitous in this, to-wit:

(a) Said count alleges therein, and it is not separately stated, four separate offenses against the United States, to-wit:

1. The offense of depositing in the United States mails for transmission postal cards upon which is delineated or printed terms or language that is libelous.

2. The offense of depositing in the United States mails for transmission postal cards upon which is delineated, written or printed terms and language that is scurrilous.

3. The offense of depositing in the United States mails for transmission postal cards upon which is delineated, written or printed terms and language that is defamatory.

4. The offense of depositing in the United States mails for transmission postal cards upon which is delineated, written or printed terms and language that is calculated by the terms and manner and style of display and obviously intended to reflect injuriously upon the character and conduct of another.

(b) The said count one alleges and does not separately state, in addition to the foregoing, two distinct offenses against the United States, to-wit, the offense of depositing in the United States mail for transmission alleged unmailable matter and the offense of causing to be deposited in the the United States mails for transmission unmailable matter.

(c) In addition to the foregoing, said count one alleges two additional, separate offenses, and they are not separately stated, to-wit:

1. The depositing in the United States mails for transmission, etc., postal cards;

2. The depositing in the United States mails for transmission, etc., post cards.

10. The first count of said indictment is bad and insufficient in law in that it is duplicitous, because it charges several distinct conspiracies, to-wit:

(a) It charges a conspiracy to commit an offense by depositing for transmission postal cards upon which was delineated, etc., unmailable matters.

(b) It charges, and does not separately state, a conspiracy to commit an offense by depositing in the United States mails post cards upon which is delineated, etc., unmailable matter, etc.

(c) It charges a conspiracy without separately stating it, to commit an offense by depositing for transmission in the mails a postal card upon which is delineated, etc. matter that was scurrilous.

(d) It charges a conspiracy without separately stating it, to commit an offense by depositing for transmission in the mails a postal card upon which is delineated, etc., matter that was libelous.

(e) It charges a conspiracy without separately stating it, to commit an offense by depositing for transmission in the mails a postal card upon which is delineated, etc., matter that is defamatory.

(f) It charges a conspiracy, without separately stating it, to commit an offense by depositing for transmission in the mails a postal card upon which is delineated, etc., matter that is calculated by the terms and manner and style of display and obviously intended to reflect injuriously upon the character and conduct of another.

11. The said first count of said indictment is so uncertain, indefinite, ambiguous and insufficient in its allegations whereby said defendants herein in or by said count

thereof are not informed of the nature and character of the accusations against them, or thereby given reasonable notice of the specific charges against them whereby they may properly prepare a defense in this matter.

(a) It cannot be ascertained from said count one whether these defendants are accused of a conspiracy to commit an offense of depositing in the United States mails postal cards upon which there was delineated, written, etc., unmailable matter, or whether these defendants are charged with a conspiracy to commit an offense by depositing post cards upon which there is delineated written, etc., matter that *it* is unmailiable.

(b) It cannot be ascertained therefrom whether these defendants are charged with a conspiracy to deposit in the United States mails certain matter, or whether they are charged with a conspiracy to cause to be deposited in the United States mails certain matter.

(c) It is alleged therein, page 2, lines 1 to 12, that the object of the conspiracy, with which these defendants are charged was to commit an offense against the United States of America, the offense being to deposit, etc., in the United States mails certain postal cards upon which IS delineated, written, etc., matter that was unmailable, whereas, it is alleged on page 3, lines 8 to 12, that the defendants did mail certain postal cards on each of which WAS printed certain matters alleged to be unmailable, by reason whereof, these defendants cannot ascertain if they are charged with a conspiracy of combining to thereafter deposit cards in the mails upon which is delineated the matters alleged to be unmailable or whether they are charged with a conspiracy in having deposited in

the mails postal cards upon which there was said matters alleged to be unmailable.

12. That Counts II, III, IV and V of said indictment are bad and insufficient in law, because each of said counts, by their terms and allegations, submit the issue of the intent of the defendants in the mailing of the said alleged postal cards, as set forth in each of said counts, "to reflect injuriously upon the character and conduct" of Stephen W. Cunningham as one of fact and not of law.

13. That Counts II, III, IV and V of said indictment are bad and insufficient in law, because each of said counts fails to charge therein that said "postal cards" were deposited in the United States mails and that the allegation that the same were deposited in the Post Office establishment is insufficient in law.

14. That said second, third, fourth and fifth counts are duplicitous in this, to-wit:

(a) There is alleged therein an offense of depositing for mailing and delivery a certain postal card which had delineated, etc., thereon terms and language that was libelous.

(b) There is charged therein and not separately stated, the offense of depositing for mailing and the separate offense of causing to be deposited for mailing postal cards containing unmailable matter.

(c) There is alleged therein and not separately stated the offense of depositing a postal card having delineated, etc., thereon terms and language that was scurrilous.

(d) there is alleged therein and not separately stated the offense of depositing a postal card having delineated, etc. thereon terms and language that was defamatory.

(e) There is alleged therein and not separately stated the offense of depositing a postal card having delineated, etc., thereon terms and language that was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of Stephen W. Cunningham and which was intended to reflect injuriously, etc.

Otto Christensen
Attorney for defendants James S. McKnight and Robert E. Taylor

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES.)

OTTO CHRISTENSEN, being first duly sworn, deposes and says: That he is the attorney for the defendants named in the foregoing demurrer; that he has read the same and knows the contents thereof; that he believes the same to be meritorious and well founded in law, and that the same is interposed in good faith and not for any purpose of delay.

Otto Christensen

SUBSCRIBED and sworn to before me this 22nd day of September, 1933.

[Seal] Alvina Sawyer
Notary Public in and for said County and State.

POINTS AND AUTHORITIES

1. A conspiracy is merged in a substantive offense shown upon the face of the indictment.

U. S. v. Fisher, 245 Fed. 477

In re Milsen, 131 U. S.

2. The matter as to whether or not the card is within the section may be raised by demurrer.

U. S. v. Davidson, 244 Fed. 523

U. S. v. Davis, 38 Fed. 326

3. The language must be clearly and per se within the Statute.

U. S. v. Lamkin, 73 Fed. 451

In re Barber, 75 Fed. 980

4. The card is not within the section.

Warren v. U. S., 183 Fed. 718

In re Barber, 75 Fed. 980

U. S. v. Jarvis, 59 Fed. 357

[Endorsed]: Filed Sep. 22, 1933. R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1933, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 27th day of September in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable: Paul J. McCormick, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	) No. 11654-M,Crim.
JAMES S. McKNIGHT et al., Defendants.	)

This cause coming on for hearing on Demurrers of defendants herein, James S. McKnight, Isidore Bley Stein and Roy E. Taylor, who are present in court; Clyde Thomas, Assistant U. S. Attorney, appearing for the Government; Otto Christensen, Esq., appearing for defendants McKnight and Taylor; Alfred Gitelson and Arthur Stollmack, Esqs., appearing for defendant Stein;

At the hour of 10 o'clock a. m., both sides answering ready, it is ordered that the hearing proceed; whereupon, Attorney Christensen argues in support of Demurrers of his clients; at 11:15 o'clock a. m. Attorney Gittelson argues in support of Demurrer of defendant Stein; Attorney Thomas argues in opposition to Demurrers of defendants; at 11:50 o'clock a. m. the cause is ordered continued to 2 o'clock p. m. for further argument;

Court reconvening in this cause at 2:05 o'clock p. m., all being present as before, Attorney Stollmack argues on behalf of the defendants in closing, and

It is ordered that Demurrers of all defendants are overruled, with exceptions noted; whereupon, each defendant now enters his plea of Not Guilty, and the cause is ordered continued to the January calendar for setting for trial.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 19th day of December in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Paul J. McCormick, District Judge.

United States of America,	)	
Plaintiff,	)	
vs.	)	No. 11,654-M, Crim.
James S. McKnight et al.,	)	
Defendants	)	

This cause coming on for further proceedings on trial as to defendants James S. McKnight and Roy E. Taylor; H. L. Dickson, Esq., Assistant U. S. Attorney, appearing for the Government; Mark F. Jones and Frank Shoemaker, Esqs., appearing for defendant McKnight, who is present; E. M. Smuckler, Esq., appearing for defendant

Taylor, who is present; G. F. Summers being present as court reporter; and the jury being present, at the hour of 10:15 a. m. it is ordered that the trial proceed, whereupon,

Roy E. Taylor is called, sworn and testifies on direct examination by Attorney Smuckler, is cross-examined by Attorney Dickson and by M. Jones, Esq.;

C. E. Webster is called, sworn and testifies on direct examination by Attorney Smuckler, is cross-examined by Attorney Dickson, and

At the hour of 10:40 a. m. defendant Taylor rests; and defendant McKnight rests; and the Government rests; whereupon

Attorney Jones renews motions of yesterday, which are denied and exception noted; and Attorney Dickson thereupon argues to the jury on behalf of the Government;

At the hour of eleven a. m. recess is declared, the jury being admonished;

It is ordered that further proceedings as to defendant Isidore Bley Stein, who is present, be continued to December 20, 1934, ten o'clock a. m., pursuant to motion of B. W. Vinetz, Esq., counsel for defendant Stein;

Court reconvening at 11:10 o'clock a. m., the jury being present and others being present as before:

Attorney Smuckler argues to the jury in behalf of defendant Taylor; at 11:20 a. m. Attorney Jones argues to the jury in behalf of defendant McKnight; at 11:50 a. m.

Attorney Dickson closes argument in behalf of the Government; at twelve o'clock noon the Court instructs the jury on the law of the case, certain exceptions to the charge being taken by Attorney Jones; at 12:45 p. m. Bailiff Floyd S. Kearns is sworn to care for the jury during their deliberations, and they now retire so to do; and it is ordered that requested instructions as given and refused be filed: whereupon, at the hour of 12:50 p. m. recess is declared in this case, and it is ordered that the jury be taken to lunch at the expense of the United States in custody of two Bailiffs, Claude J. Harris being sworn as additional Bailiff;

Court reconvening at 3:45 p. m., the jury return into court, all being present as before except Attorney Jones, and A. Wahlberg now acting as court reporter; Attorney Jones' presence is waived by defendant McKnight, whereupon, the Court now further instructs the jury at their request, and it is ordered that memorandum request by the jury be filed, the jury again retiring at 3:50 o'clock p. m. to deliberate further;

At the hour of 4:25 p. m. the jury returned into court, all being present as before except that J. W. La Pointe is now acting as court reporter and Attorney Jones is still absent: the presence of Attorney Jones is waived by defendant McKnight, whereupon, the jury present their verdict of Guilty on four counts as to defendant McKnight, and Not Guilty as to defendant Taylor, which is read by the Clerk and ordered filed and entered; said verdict being as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES S. McKNIGHT and ROY E. TAYLOR, charged as Robert E. Taylor, Defendants. No. 11,654-M Crim. VERDICT.

We, the jury in the above entitled cause find the defendant, James S. McKnight, Guilty as charged in the 1st count of the Indictment,

and Guilty as charged in the 2nd count of the Indictment, and Guilty as charged in the 3rd count of the Indictment, and Guilty as charged in the 4th count of the Indictment, and find the defendant, Roy E. Taylor, charged as Robert E. Taylor, Not Guilty as charged in the 1st count of the Indictment, and Not Guilty as charged in the 2nd count of the Indictment, and Not Guilty as charged in the 3rd count of the Indictment, and Not Guilty as charged in the 4th count of the Indictment.

Dated, Los Angeles, Calif., December 19, 1934.

Fred O. Bunnell
Foreman of the Jury.

It is ordered that defendant Taylor be discharged and that his bond, as filed in case No. 11488-M Crim., be exonerated. The jury are discharged from the case and ordered to return January 8, 1935.

Defendant McKnight is now called for sentence, and makes a statement in his own behalf; whereupon, Post Office Inspector C. E. Webster, makes a statement of the case; and

Defendant Isidore Bley Stein, who is present, is now called for sentence on his plea of Nolo Contendere heretofore entered, and said defendant makes a statement in his

own behalf, whereupon, it is ordered that the first count herein be dismissed as to defendant Stein, and the Court now pronounces sentence upon said defendant for the crimes of which he stands convicted, viz: violation of Section 212 of the Federal Penal Code, and

It is the judgment of the Court that defendant Isidore Bley Stein pay unto the United States of America fine in the sum of $200.00 on each of the 2nd, 3rd, 4th and 5th counts and stand committed to the Los Angeles County Jail until said fines are paid; and the Court now pronounces sentence upon defendant McKnight for the crimes of which he stands convicted, viz: violation of Sections 37 and 212 of the Federal Penal Code, and

It is the judgment of the Court that defendant James S. McKnight, on the first count, be confined for the term of sixty (60) days in the Los Angeles County Jail, and in addition that he pay unto the United States of America a fine in the sum of $500.00, and stand committed to said County Jail until fine is paid; and upon each of the 2nd, 3rd and 4th counts, defendant is sentenced to a term of six (6) months in said County Jail, said terms of imprisonment imposed on the 2nd, 3rd and 4th counts to begin and run concurrently and not consecutively, and to be suspended for a period of two (2) years on condition that defendant refrain from the violation of any laws of the United States, and he is to report to the Probation Officer of this District for such further instructions as may be required.

Bond on appeal as to defendant McKnight is fixed at $5000.00.

A stay of execution of one day is granted to defendants McKnight and Stein.

(Testimony of Mrs. W. A. Cummings)

[Title of Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered, that heretofore, to-wit, on the 14th day of December, A. D. 1933, before the Honorable Paul J. McCormick and a jury, the above entitled cause came on for trial, and that upon said trial of said cause, Messrs. Hugh L. Dickson and Charles H. Carr appearing as counsel for the plaintiff, and Messrs. Mark F. Jones and Frank C. Shoemaker appearing as counsel for the defendant James S. McKnight, the following proceedings were had:

MRS. W. A. CUMMINGS,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That during the month of May, 1933, she merely addressed some cards, some long sheets; that she was looking for work; that she was going by campaign headquarters and stopped in; that the headquarters were some place on Wilshire, but did not know whose headquarters they were; that she did not remember to whom she talked; that she just asked whoever was in charge if there was any work to be had and that she got work addressing some cards; that by cards she meant postcards. That she was given a mailing list to copy the addresses off; that she took some cards and the mailing list home and did the addressing there. After she addressed the cards a person whom she did not know called and she delivered the same to him; that she did not remember how many cards she addressed. The witness identified a card, plaintiff's Exhibit No. 1, and stated that the name on the front of said card was

(Testimony of Mrs. W. A. Cummings)
in her handwriting. The reception of said exhibit in evidence was objected to on the grounds that the same was irrelevant and no foundation had been laid. The objection was overruled and defendant noted an exception. Said Exhibit No. 1 is in words and figures as follows:

(Card) Cancelled one cent stamp

Los Angeles, Calif.
May 22 2 P. M. 1933
Arcade Stat. 1

THIS SIDE OF CARD IS FOR ADDRESS

Mrs. A. M. Meinell
1628 Federal Av
West L. A.
Calif. 1155

(reverse side of card)

DEFEAT CUNNINGHAM FOR COUNCIL

We protest

Many people have been misinformed—and believe that Stephen W. Cunningham, candidate for council from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mis-management of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE, UNIVERSITY OF CALIFORNIA at Los Angeles, 215 West 7th Street.

(Testimony of Mrs. Sallie J. Thompson)

The witness further testified that she received compensation for addressing the cards, but did not remember from whom; that she didn't remember being paid by check and guessed that she was paid by cash. The witness then identified Plaintiff's Exhibit No. 2 as a check which she had received for addressing the cards; that she tried to cash the check, but there were insufficient funds in the bank "so I received cash afterwards"; that she did not remember from whom she received the check. Upon objection that same was irrelevant and no foundation had been laid for the reception of said check in evidence, said check was marked Plaintiff's Exhibit No. 2 for identification.

The witness further testified that her son also addressed some of these cards at her home.

CROSS-EXAMINATION

The witness did not remember whether any of the printed matter appearing on the reverse side of Plaintiff's Exhibit No. 1 was on there at the time she first had the card or first saw it; that to the best of her knowledge she had never seen the defendant R. E. Taylor prior to the trial.

MRS. SALLIE J. THOMPSON,

called as a witness on behalf of the plaintiff, identified Plaintiff's Exhibit No. 3 as a postcard that she had received through the United States mails. To the reception of said exhibit in evidence, the defendant objected upon the ground that the same was irrelevant and no foundation had been laid.

(Testimony of Mrs. Jessie Parker)

"THE COURT: It ought to be connected up a little more definitely. It may be received with the understanding that it will be connected up as far as the defendants are concerned, and unless it is, it will go out of the record."

To which ruling of the court the defendant noted an exception.

Said Exhibit No. 3 is identical in form and text with Exhibit No. 1 hereinabove appearing, with the exception of the name of the addressee, which in the instance of Exhibit No. 3 reads:

"Mrs. S. J. Thompson, 423 N. Spaulding Ave City".

MRS. JESSIE PARKER,

called as a witness on behalf of the plaintiff, having been first duly sworn, identified plaintiff's Exhibit No. 4 as a card which she received through the United States mails on or about the date appearing thereon, to-wit, May 23rd, 1933. To the reception of said exhibit, the defendant objected upon the grounds that the same was irrelevant and that no foundation had been laid for its introduction in evidence. The objection was overruled and an exception noted.

Said plaintiff's Exhibit No. 4 is identical in substance and text with plaintiff's Exhibit No. 1 appearing hereinabove, except for the name of the addressee, which in the instance of Exhibit No. 4 is,

"Mrs. J. L. Parker, 1319 Holmby Ave City".

(Testimony of West Eichen—Angelina Hart)

WEST EICHEN,

a witness called on behalf of the plaintiff, having been duly sworn, identified plaintiff's Exhibit No. 5 as a card he received through the United States mails in May of 1933. To the reception of said exhibit in evidence, the defendant objected upon the ground that the same was irrelevant and that no foundation had been laid for its reception in evidence. The objection was overruled and the defendant took an exception to said ruling of the court.

Said Exhibit No. 5 is the same in substance and in text as plaintiff's Exhibit No. 1, with the exception of the name of the addressee, which in the instance of Exhibit No. 5 is,

"West Eichen, 840 S. Bedford St. City".

ANGELINA HART,

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows: That in May, 1933, she procured work addressing plain postal cards; that she obtained this employment on Wilshire Boulevard around the 6300 block; that previous to obtaining this employment she had been at this address several times; that she didn't recognize anyone in the courtroom that she had seen on the first day she was there, with the exception of a Mr. Robeson sitting in the audience; that she did not know Mr. Robeson's name the first time she went in there; that she does not know a man by the name of Ringer, but she has seen him; that she saw him at the office on Wilshire Boulevard; that the office was away out on Wilshire; that she didn't believe there was any name

(Testimony of Angelina Hart)

on the office: that she first met Mr. Ringer when he came over to her house about May, 1933. The witness identified plaintiff's Exhibit No. 6 as a piece of paper that she had seen at the post office at Third and Central about the month of May, 1933; that she first saw it when she went to the post office at that address; that she thought she got a permit on it; that she must have had something to do with "that piece of paper" because she signed it; that the signature of "A. Hart" on the bottom of it was her signature; that she got the paper to sign at the post office from some clerk; that she didn't remember signing it; that this piece of paper (plaintiff's Exhibit No. 6 for identification) she thought was just like this, but didn't remember for sure; "I really don't remember; I remember going over there for that permit and I had to sign something and this is my signature"; that at the time she received the permit she gave it to Mr. Ringer, who was outside of the post office; "I just handed it to him and I don't know what he did with it"; that she did not see it afterwards until it was produced in court, except once before the grand jury; that as far as she knows it is in the same condition as it was when she delivered it to Mr. Ringer: that when she went into the post office Mr. Ringer gave her $10 for the permit; that she went into the post office and got the permit; that she had to sign to get the permit.

Plaintiff's Exhibit No. 6 for identification was received in evidence over the objection of the defendant that same was irrelevant and no proper foundation had been laid for its introduction. An exception was noted to the ruling of the court.

(Testimony of Angelina Hart)

Plaintiff's Exhibit No. 6 is in words and figures following:

"APPLICATION TO MAIL THIRD-CLASS MATTER IN BULK UNDER SECTION 435½ P. L. AND R.

Post Office, Los Angeles, Calif.

FEE PAID May 17, 1933, 193...

POSTMASTER:

Application is hereby made for a permit to mail third-class matter in bulk under the conditions prescribed by section 435½ 562, Postal Laws and Regulations, in quantities of not less than 20 pounds or 200 pieces.

I desire to mail the matter in the manner checked below:

(1) Without stamps affixed under permit, the postage being paid in money and the permit indicia being PRINTED on the matter - - - - - - - - X

(2) With PRECANCELED 1-cent stamps affixed - - - - -

(3) In Government precanceled 1-cent stamped envelopes -

Mail at station.

Alumni Protest League
(Signature of applicant)
215 West 7th Street,
A Hart. (Address)

10296
West Los Angeles RO 3744
Form 3612B"

(Testimony of Angelina Hart)

The witness further testified that she did not know where Mr. Ringer was working at that time.

The witness further testified that she had seen plaintiff's Exhibit No. 3 in the office of the Post Office Inspector and also before the grand jury; that she did not see it anywhere else; that she addressed many of them, but did not know this particular one; that the handwriting on it looked like her sister's handwriting, Genevieve Aspley.

The witness identified plaintiff's Exhibit No. 7 as a check she received from the defendant R. E. Taylor "for addressing postal cards"; that she first saw the check at the office on Wilshire Boulevard; that the postcards were delivered to her house but she did not know by whom they were delivered.

"MR. CARR: I wish to offer this in evidence as Government's Exhibit No. 7.

MR. JONES: Objected to as incompetent, irrelevant and not binding upon the defendant McKnight. No foundation laid to bind him.

THE COURT: Sustained, unless it is connected up. Gentlemen, it is not to be considered as yet as to the defendant McKnight."

Whereupon the check referred to was received in evidence, marked plaintiff's Exhibit No. 7, which exhibit is in words and figures following:

(Testimony of Angelina Hart)

(Check)

"In full to date No. 125

Los Angeles, Cal., 5/20 1933

PAY TO THE ORDER OF Angie Hart - - - - $11.62
Eleven & 62/100, - - - - - - - - - - - - - - DOLLARS

Wilshire-LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd. Los Angeles L. Simmons"

(Endorsed on back)
"Angie Hart
1445 W 24th St.
Los Angeles, Cal."

(perforation)
PAID 5 23 33.

(rubber stamp)
Pay to the order of any bank or Banker or through Los Angeles Clearing House.
16-77 UNION Bank & Trust Co. of Los Angeles MAY 22, 1933.

9.

"Q. I show you again Government's Exhibit No. 3 and ask you to look at the printing on the back of the card. Have you ever seen that printing on any cards before?

(Testimony of Angelina Hart)

A You mean when I addressed them?

Q Yes.

A No. I didn't see that printing on any post cards at any time. The cards I addressed were blank. The first time I ever saw any printing of that kind was before the grand jury."

The witness further testified that she did not remember having seen a piece of cardboard identified as plaintiff's Exhibit No. 8 for identification, but had seen cards like it; that she had seen cards with the subject matter that is shown on plaintiff's Exhibit No. 8, for identification.

The witness further testified that she had collected other money for her services in addition to the check, plaintiff's Exhibit No. 7, for identification, but she didn't remember the exact amount; that she asked about everybody in the office before she got it; that the only defendant she saw in the office at that time was R. E. Taylor.

The witness further testified that she knew Mr. Stein; that she first met him about eight years ago; that she saw him in May, 1933, at the office at Wilshire Boulevard; the same office at which she saw Mr. Taylor; that she had a talk with Mr. Stein; that when she first went to the office she saw Mr. Robeson and told him that she wanted to see Mr. Stein; that she had heard that Mr. Stein was there; "the only one I remember who was present when I talked to Mr. Stein was Mr. Robeson".

(Testimony of Angelina Hart)

CROSS-EXAMINATION

That the only conversation she had with the defendant R. E. Taylor was to ask him to get paid for addressing the cards; that she had no discussion with him as to what she was to put on the cards; that when she received the cards they were perfectly blank; that she saw the person who delivered the cards "but it wasn't Mr. Taylor", and that she did not remember "who it was at all"; that someone picked up the cards at her house; that she was present some of the times that somebody came over "to pick up the cards"; that she does not know who sent the person for the cards; that all she knows is that somebody came over after the cards; she does not know the name of the person who came and got the cards.

"Q Who was it who employed you?

A Well, I don't know who did, because I went out there and asked to see Mr. Stein. They said he was busy and I waited for a few hours, and someone brought some cards in and a mailing list and they said, 'Address those,' while I was waiting to see him.

Q Was there anything on the cards.

A No.

Q And the cards you addressed for which you received payment were also blank cards?

A Some of them.

Q Some were blank and what was the others?

A The one I just had a few minutes ago, but I didn't get those at first.

Q The large card?

A Yes."

R. L. CASEY,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That he was identified with the Seaboard National Bank at Wilshire and Dunsmuir in Los Angeles in May, 1933, and knew the defendant R. E. Taylor, who had a real estate escrow at that bank; that Mr. Taylor did not open an account with his bank during that year, either in his own or any other name; that he did not know R. E. Taylor by any other name; that a lady opened an account in his bank under the name of L. Simmons; that he did not personally meet Mrs. Simmons, but that an account was opened at the bank in the name of L. Simmons; that the records of his bank reflect that this account was opened on May 12th, 1933, and continued until June 30th, 1933; that he never saw the party who opened the account. The government thereupon had the ledger sheet of said bank marked as its Exhibit No. 9 for identification and had marked as its Exhibit No. 10 for identification a package of papers containing the signature card and several deposit slips.

ADELE MAUD MEINELL,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows: That she had previously seen Government's Exhibit No. 1 at her office on or about the 23rd day of May, 1933; that it was delivered to her office by a mail carrier.

CROSS-EXAMINATION

That she is in the real estate and insurance business and was active in the campaign; that she supported the

(Testimony of Isador Bley Stein)

candidacy of Mr. Cunningham and was one of his lieutenants or workers in the campaign; that two days after receipt of plaintiff's Exhibit No. 1 she gave the card to Mr. Cunningham; that she was a paid worker of Mr. Cunningham's campaign and was paid by the campaign committee; that she received in the neighborhood of $500.00 for approximately three months work.

ISADOR BLEY STEIN,

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

That he knows the defendants McKnight and Taylor; that he has known them since May, 1933; that he met Mr. McKnight in his campaign office at Wilshire and La Brea; that the office was located in the Ritz Theater Building; that he met Mr. Taylor at 6300 Wilshire Boulevard, which was "a campaign headquarters" for Mr. McKnight; "I worked in the campaign with them; I don't believe I was hired; it was a mutual agreement between Mr. McKnight and myself"; that he went to work at the headquarters about May 6th, 1933; that he saw Mr. Taylor almost daily in the campaign headquarters; that he had charge of about fifteen people that solicited precincts; that he was in the campaign headquarters ten days all the time, then off and on for three or four days; that the ten days he speaks of were put in at the headquarters to about the 15th or 16th of May, and the three or four days he speaks of were put in after until the campaign was over; that he saw Mr. Taylor at the headquarters during that time; that Mr. Taylor did not have an office or a desk in the headquarters; that he never saw

anyone sign the checks; that the employes that he saw paid were paid in cash by Mr. Robeson; that to a certain extent he had something to do with the preparation of campaign propaganda and pamphlets; that what he did in this regard was to furnish "the information to Mr. McKnight and what he proposed to put out in the newspapers"; that he told Mr. McKnight different things that he knew about the opposing candidate and "that was the facts that he intended to use in his statement".

"Q Did you ever prepare anything at any time for the purpose of presenting to the public as campaign streamers or "postcards or pamphlets or anything of that nature?

A I didn't directly prepare anything myself. I worked with Mr. McKnight on several pieces of campaign literature or on the wording or data on literature that would have gone out."

The witness further testified that he prepared in rough draft a letter to be sent by the defeated candidates who were in favor of Mr. McKnight; that he took this letter to Mr. McKnight's house to have those men sign it; that he worked with the artist on the preparation of drawings; that he worked on the wording of the matter that would be distributed to the voters.

"I helped the artist, I talked with him when he drew this borderline", referring to the back of the card, plaintiff's Exhibit No. 3.

"Q I mean by the composition of it, the wording of it, the subject matter.

A I made that portion of it. (indicating)

Q Who made the other?

(Testimony of Isador Bley Stein)

A It was made up between Mr. McKnight, Mr. Lee Ringer and myself."

That this was done around the 10th of May; that he was familiar with the routine of the office.

"Q What was the routine as to presenting this subject matter to the public?

A I cannot say. Mr. Ringer is a friend of mine that I sent to Mr. McKnight to see if he could work up the printing, there was a lot of printing to go out, and help in the advertising business."

That he was around the headquarters; that he saw him with different pieces of mailing matter to be printed; that he had gone out and gotten bids on it and he had returned with those bids in the regular way and had received his commission on it; that he does not know who L. Simmons is; that he never sent out any cards; that he never knew of any being sent out from campaign headquarters.

"Q Did you ever at any time discuss it with anyone as to any cards being sent out?

A Not definitely as to certain cards. I had a conversation with reference to the possibility of postcards going out with Lee Ringer and Mr. McKnight about the 10th of May. We had prepared to send out a newspaper and Mr. McKnight had suggested that we get started on the campaign and we expected to have to add something to the newspaper in the way of handbills and letters or something of that nature. I think he had determined before that what they should be, and a rough draft had been made, and at that time he made a suggestion that perhaps we might be able to use postal cards because they were cheaper. * * * That was the only conversation I had

with them directly about postal cards. That conversation I think was the only one I had relative to postal cards.

Q Has anyone talked to you about this case in the last couple of days?

A No, sir.

Q You haven't been talked to by anybody?

A No, sir.

Q Has Mr. Taylor talked to you?

A No, sir.

Q He hasn't talked to you about the court room here?

MR. JONES: I object to that as cross examination of his own witness.

MR. CARR: At this time I am going to ask to be allowed to cross-examine this witness on the ground of surprise.

MR. JONES: We object to that at this time for the reason that the witness has shown no hostility whatsoever and has freely, frankly and voluntarily answered the questions, all questions that have been propounded to him. He is a defendant in the law suit and is voluntarily testifying in this case and for that reason I object to the witness being cross examined, a total absence of any reason why he should be permitted to cross examine him.

Q BY THE COURT: Are you a defendant in any civil suit pending between these other defendants? A. No, sir.

Q You entered a plea of what we call nolo contendere here in this case? A. Yes, sir.

Q And on the date that that plea was entered the United States Attorney, Mr. Carr, was here, was he not? A. Yes, sir.

(Testimony of Isador Bley Stein)

Q And he suggested to the court that the government was willing that the court should receive that plea of nolo contendere, didn't he? A. Yes, sir.

THE COURT: You may cross examine him, Mr. Carr.

MR. JONES: Exception.

Q I hand you here Government's Exhibit No. 3, certain language there with the letters or the words appearing thereon, 'Alumni Protest League'. What is that League?

A The League is nothing.

Q What do you know about that, Mr. Stein?

A All I know is that is the name of a league, used as a name to put out information against the candidacy of Cunningham.

Q Do you know where that name came from?

A Yes, sir, I think this name came from Mr. McKnight's suggestion.

Q Just give us the date when that suggestion was made?

A About May 8th or 9th; I think Lee Ringer was present.

"MR. JONES: I object to that upon the ground that it does not tend to prove or disprove the conspiracy charged in this indictment. * * * The indictment * * * refers to * * * the mailing of a particular postal card and not to the formation or any of its contents. * * * That is not charged in the indictment * * * and * * * any testimony of that kind would be incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled.

MR. JONES: Exception.

(Testimony of Isador Bley Stein)

Q Relate the conversation.

A I had previously arranged with Mr. McKnight on the preparation of a newspaper and Mr. McKnight suggested that we mail something or send out handbills earlier in the campaign, that the newspaper would take considerable time to prepare, and he asked me if I would, if I would see to the sending out of letters telling about the campaign. He knew that I had gone to the university and that I had known Mr. Cunningham at the time he was manager there and the facts that I told him about as to his mismanagement of the affairs and that those facts should be known to all of the voters, and at the time he asked me I told him that my name wouldn't mean anything signed to a letter, just a waste of postage, and at that time he suggested that since Lee Ringer and myself and the girl who was there that I had sent for a job were all graduates of the university perhaps we should form an association and use a name which would become or would be effective in that particular group, and I told him that I would not, that so far as the Alumni Association was concerned they were all for Cunningham and there was no percentage in trying to make up a league of alumni, and at that time he suggested it would only be a protest league, that no one would know he was in it, that he was not publishing any of the members, and we might as well call it an alumni association.

Q Anything further said as to taking an office location for that organization?

A Yes, sir. He said that there would have to be some form of dignity to it if it was going to be an organization. He asked me what was my address downtown because he said we could use the address down there, and

(Testimony of Isador Bley Stein)

naturally the building there was at 215 West Seventh Street, the Bartlett Building, and he said, 'So far as the League is concerned can't we use that?' and I told him it was the number of the building, and so far as I was concerned that they were welcome to it, that they had 400 rooms there, and that it didn't make any difference to me what it was used for.

Q Was the name used in the campaign?

A That name was used.

Q In what way was it used?

A It was used the way it was used there on this card, apparently was used.

Q Did you know what was the way it was going to be used?

A The only way I knew it was used it was used for sending some of these cards, they used that same name for them.

Q Did you have any conversation with Mr. McKnight at any time later with reference to any postal cards or any post cards that had been mailed or might have been mailed?

A Yes, I had a couple of conversations after this, that is, after we heard the postal cards went out.

Q Who was present at that time?

A That I can't recall because I don't remember exactly the conversation.

Q Were you present? A. Yes, sir.

Q Who else? A. I don't recall.

Q Was Mr. McKnight present? A. Yes sir.

Q Was Mr. Taylor present? A. I don't think so. I don't believe he was there.

Q About what was the date of that conversation?

(Testimony of Isador Bley Stein)

A It was around the time these cards were—I received one of these cards approximately around May 20th.

Q All right, now; relate the conversation.

A I went down to the building where I was located and I had received 50 different calls from different people wanting to know why I was opposed to the university and why I was dragging the university into a political squabble, and Cunningham called up, and two or three people called up telling me what they were going to do and what I had done, and so forth, and I spoke to Mr. McKnight, telling him that apparently something was wrong somewhere because people all thought that I was financing a campaign against the university, that we had had a lot of people in the office there, one man posing as a postal inspector, and I understand people had made threats of what they were going to do with the Grand Jury, and so on, and I told them that so far as I was concerned I was getting out of the campaign, I was through, and I told him that it was a fine mess so far as I was concerned.

Q Was there any further conversation?

A I don't think so.

Q Did Mr. McKnight have anything to say?

A No, sir; only that he was sorry he had caused me any inconvenience. He said he didn't think any wrong had been done, and so far as he was concerned he didn't feel I had done anything myself in any way to get me in bad with the university.

Q Was Mr. Taylor at the office at that time, at any place in the office?

A Well, to be very truthful I don't remember Mr. Taylor around at that time.

(Testimony of Isador Bley Stein)

Q Well, now, Mr. Stein, will you look again at Government's Exhibit No. 3, at the subject matter, and state just what portion of that subject matter that you yourself prepared?

A Well, together with Mr. McKnight and Lee Ringer, the three of us prepared all of the matter that is on there except perhaps some of the phraseology.

Q Read the part that you prepared, Mr. Stein.

A It says, 'Many people have been misinformed and believe that Stephen W. Cunningham, candidate for Council, from the Third District, is the Graduate Manager of the University of California at Los Angeles. In view of the fact that he is in truth not a graduate of our university we believe that the erroneous impression should be corrected." I prepared that information.

Q What part of it did Mr. McKnight prepare?

A Part of the discussion that occurred was relative to the idea that the reading matter was not strong enough and the other phase should be inserted.

(Question read)

A May I explain, at the time we had prepared the other part, I gave a copy to Lee Ringer and Mr. McKnight —he asked about the bids on the printing and Mr. McKnight suggested to check through the matter again, he said that he didn't think it was strong enough, that it didn't say anything, and at that time suggested we should say something about his management or mismanagement, and at the time that we had the conversation he said that we had better put in something about his not being a good manager of the funds, and he inserted this, 'Since his gross mismanagement of finances there has led to his dismissal'.

(Testimony of Isador Bley Stein)

Q Mr. McKnight prepared that there himself?

A Yes, sir, I think so, that part."

The witness testified that he knew Miss Hart and saw her at the campaign office in 1933; that he didn't see her do any work there; that all he knew about her activities was that he had sent her there to get work.

That he knows a man by the name of Nolan, who is an artist; that he met him at the headquarters in 1933 in connection "with the border line that was originally intended for a newspaper cut"; that Nolan drew the border on plaintiff's Exhibit No. 4.

"Q I show you here, Mr. Stein, Government's Exhibit No. 8 for identification, and I call your attention there to the subject matter and the printing on the back. Have you ever seen that subject matter at any time?

A I have seen the drawings, that is the outline there, the words.

Q Have you ever seen the subject matter of composition of the words there?

A Yes, sir, I have seen that; I have seen a copy of these cards.

Q Where did you see them?

A I can't recall exactly where I saw them. I know I have seen certain of these cards. I think it was right around the time of election that somebody handed me one of these cards".

That the artist did the work on the drawings on Exhibit No. 8 for identification; that "that was prepared at the same time that the artist came out and prepared the work on the other one".

"Q Well, I will ask you, Mr. Stein, relative to Government's Exhibit No. 8 for identification, if you had any

(Testimony of Isador Bley Stein)

discussion at any time as to the subject matter of that card?

A The only discussion I had was at the time the artist returned the two drawings and there was some correction made on entire cut." That the artist returned the two cuts at the same time; that he never had anything to do with any permit of any kind while he was at headquarters, but "had a conversation relative to it" about May 15th or 14th "at the headquarters"; that there was present Lee Ringer, Mr. McKnight and the witness. The witness further testified, "I was in another part of the office there and Mr. Ringer came in and said they needed a permit, that the cost was $10; I told him I did not know anything about that and he would have to see Mr. McKnight;" that he went to Mr. McKnight and Mr. McKnight said "all right"; that he told him he needed $10; that he said "We will have to have it"; that he told him to go to Mr. Taylor and get the $10; that he went to Mr. Taylor and asked him for $10 and he took it out of his pocket and gave me the $10. The witness further testified he gave the $10 to Mr. McKnight, who in turn gave it to Mr. Ringer.

"Q What did he do then, go outside or what?

A I went into the other office and Ringer came in to see me, and said he was in the advertising business and he was connected with the university and he didn't want to take out the permit in his name for political reasons so he wanted to know if I would take out the permit or have somebody take it out.

MR. JONES: I move to strike that as not in the presence of Mr. McKnight.

(Testimony of Isador Bley Stein)

THE COURT: The objection is overruled.

MR. JONES. Exception."

The witness further testified that he went out and had a talk with Mr. McKnight, who asked him if he would get the permit. The witness responded that he wasn't interested in any campaign permit; that Mr. McKnight inquired "Who can you send then? Have we got a girl here?" The witness said, "Well, so far as a girl is concerned any of them can go down there"; that McKnight said, "What is the name of the girl you sent over here to do some work?" "and I said, 'Hart', and he said, 'Is she all right; can she go?' and I said, 'I guess so', and Ringer asked me where she lived and I gave him the address and he went over and picked her up.

Q You have spoken of a permit. What was the permit supposed to be for, Mr. Stein?

A It was supposed to be for mailing out matter, and what it was to be classed in, it was a postal permit.

CROSS-EXAMINATION

The witness further testified that the composition on plaintiff's Exhibit No. 3, which he had identified as personally preparing, was written on a sheet of paper and was not on plaintiff's Exhibit 3 when he prepared it; that the remainder of the composition on plaintiff's Exhibit No. 3 was prepared in the presence of himself, Lee Ringer and Mr. McKnight; that Mr. McKnight asked him if he thought it was strong enough, to which he replied that he didn't know. Mr. McKnight said, "Well it doesn't seem to say much. We had better say something about his not being a good manager" and I told him that was all right. That in that conversation he told Mr. McKnight

(Testimony of Isador Bley Stein)

that Mr. Cunningham was not a good manager, that he had mismanaged the finances up there at the university and that he had been dismissed from that position; also the witness testified that the first time he met Mc-Knight he told him he should use that information in the campaign. The witness further testified that he told Mr. McKnight that Cunningham had grossly mismanaged the finances there and that he could prove it; that the sheet of paper upon which was written the subject matter later appearing on plaintiff's Exhibit No. 3 was given to Lee Ringer.

"Q You didn't know when it was going to be used or what it was going to be used for at that time, did you?

A No, sir."

That there was no statement made either by Mr. Mc-Knight or Mr. Ringer as to how the information contained in that piece of paper which had the same language on it as the body of the plaintiff's Exhibit No. 3 was to be disseminated to the public; that he had no knowledge who sent out plaintiff's Exhibits Nos. 2, 3, 4 and 5; that he never saw plaintiff's Exhibit No. 8 for identification, until after the indictment; that he had previously seen the art work appearing on plaintiff's Exhibit No. 8, but had not seen the body or the printed matter until after the prosecution was commenced; that the art work appearing on plaintiff's Exhibit No. 8 for identification was drawn "to be used in a newspaper; that those cartoons were to be used in a newspaper"; that he never heard any talk that they were to be used otherwise than in a newspaper; that this was also true of the text appearing in the body of plaintiff's Exhibit No. 8 for identification; that he had no knowledge that plaintiff's Exhibit No. 8

(Testimony of Isador Bley Stein)

was ever used as a postal card; that he never *new* Mr. McKnight until May of 1933; that he went to him of his own volition; that Mr. McKnight had not sent for him.

"Q You told him that you were interested in his campaign and that you would like to assist him?

A * * * I met him and introduced myself to him and told him—he asked, 'Would I care to help him' after I had explained the fact that Cunningham had been dismissed as manager of the university and I believed that if people knew that I didn't think he would get many votes, and he asked me, 'Would I care to help him?' and I told him, 'Yes'."

That when Mr. Ringer came to him regarding the $10 for a permit Ringer did not tell him of the kind of a permit he expected to get and that he didn't know what Ringer was going to mail under the permit. "Q And Mr. Stein, so far as you heard any conversation, you didn't know what was going to be mailed under that permit? A No, sir." The witness further testified that there were many people working at the campaign headquarters at that time, perhaps eighteen or twenty.

RE-DIRECT EXAMINATION

That around May 12th "Mr. McKnight told me to have Ringer get an estimate of the printing of the matter he had written to go inside of the drawing for the cut that had been made and get that reading matter printed. I asked him how many and he said about 25,000." The witness further testified the 25,000 was "of that paper". "Q. What kind of paper? A. He didn't say." The witness further testified that he received a postal card with the subject matter of the kind that was on plaintiff's Exhibit 4.

(Testimony of Elsie Peters)

ELSIE PETERS,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That she was a clerk in the Los Angeles post office in May, 1933; that she had previously seen plaintiff's Exhibit No. 6, an application; that she filled out said exhibit and that a person by the name of A. Hart signed it; that this was done at the Permit Department at Third and Central; that other papers were issued by the post office department in the regular course of business at the time the application was signed by the person for a permit; that there is a yellow sheet that is issued in triplicate that is the real permit. Plaintiff's Exhibit No. 11 for identification is a file from the Permit Department, "that is the third copy of the permit that is issued; there are three of them; the original goes to the permittee, to the person to whom the permit is issued and the second one goes to the Department at Washington, and the third one is kept in the Permit Department. This is the third copy of the permit that was issued"; that plaintiff's Exhibit No. 11 is made by the postal clerk simultaneously with the execution and delivery of the application, plaintiff's Exhibit No. 6, and the stamp of the local post office is impressed upon the paper at that time. The permit was received in evidence as Government's Exhibit No. 11 and is in words and figures following:

(Testimony of Elsie Peters)

"Form 3601—ED. 1929

PERMIT TO MAIL NONMETERED SECOND, THIRD AND FOURTH CLASS MATTER WITHOUT POSTAGE STAMPS AFFIXED, AS PROVIDED BY SECTIONS 562 and 589 POSTAL LAWS AND REGULATIONS

UNITED STATES POST OFFICE

Los Angeles, Calif.

Permit No. 10296 May 17, 1933.

Alumni Protest League,
215 West 7th Street,
Los Angeles, Calif.

Permission is hereby granted you to mail identical pieces of nonmetered third or fourth class matter, or second class matter chargeable with the transient rate or the rates applicable to copies mailed for local delivery by letter carrier at free-delivery offices, without postage stamps affixed, on prepayment in full of the lawful postage in money, under the provisions of Sections 435½ and 452, Postal Laws and Regulations, provided the conditions governing the acceptance of such matter, printed on this permit, are fully complied with.

Receipts will be issued for the mailings in accordance with the prescribed conditions and these receipts may be compared with the statement which will be furnished you on Form 3613 at the expiration of each month, if desired.

If no mailings are made under this permit for a period of twelve months, its surrender for cancellation will be requested. Mailings to be made at West Los Angeles Sta. 1544 Purdue St. ONLY.

e p

RO 3744

P. P. O'Brien, Postmaster."

(Testimony of George T. Woodbury)

The conditions upon which nonmetered mailings under this permit are allowed, are contained on the reverse side. Because of the impracticability to here reproduce the same in the record, said exhibit is being separately certified to.

GEORGE T. WOODBURY,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That he was manager of the Bartlett Building, located at 215 West Seventh Street, and as such had control of the renting of the offices; that he had a list of the offices and who rented the different offices. "Q. Referring to May, 1933, did you have a tenant there carrying the name of Alumni Protest League? A. Not that I know of." That if they did, he would know if it; there might have been, but not on his records; that they rent the offices for other purposes besides the name under which they are rented; that he never saw the name of Alumni Protest League in any office in that building.

CROSS-EXAMINATION

That they have a great many tenants in the building; that 10% of the cases were tenants renting office space, that they don't know to whom the tenant may sub-rent or sub-lease space to; that he didn't know whether in May, 1933 any tenant in the building had desk space in an office by the name of Alumni Protest League, or whether any tenant in the Building had given anyone office space in the name of the Alumni Protest League.

(Testimony of Stephen W. Cunningham—Loran R. Fisher)

EXAMINATION

BY THE COURT

That he knew Mr. Bley Stein; that he had space in that building last year; that he had seen R. E. Taylor, but in what place or in what connection he could not recall.

STEPHEN W. CUNNINGHAM,

a witness called on behalf of the plaintiff, and having been duly sworn, testified as follows:

That he was a member of the Los Angeles City Council and had been such a member since July 1st, 1933; that he was elected at the general election on June 6th, 1933; that he was a candidate in the primary May, 1933; that he knows Mr. McKnight and that Mr. McKnight was an opponent of his in both the primary and the final election.

LORAN R. FISHER,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That he was employed by the Seaboard National Bank during the month of May, 1933, at Wilshire and LaBrea; that he knows the defendant R. E. Taylor; that he became acquainted with Mr. Taylor a short time prior to May, 1933, and that he saw Mr. Taylor during the month of May; that of plaintiff's Exhibit No. 10 for identification, he had seen the signature card, the identification card and the deposit ticket dated May 12th, 1933; that he saw Mr. Taylor at the bank on May 12th, 1933 in company with a lady whom he introduced to the witness

(Testimony of Loran R. Fisher)

as Mrs. Simmons; that he gave her name as Mrs. L. Simmons and said she was his secretary; that they expressed their desire to open a bank account "which was done at that time"; that he did not know the person L. Simmons prior to that date and he does not know who L. Simmons is.

To the reception of plaintiff's Exhibit No. 10 in evidence the defendant objected upon the grounds that the same was irrelevant, incompetent and immaterial and that no showing had been made that the defendant authorized the opening of the account or that it was opened in his presence or with his knowledge.

"THE COURT: Unless it is connected up with the defendant McKnight it will not be considered as to him,—the objection of the defendant Taylor is overruled".

Said document was received in evidence and marked plaintiff's Exhibit No. 10 for identification. Said exhibit is separately certified to the Circuit Court of Appeals because of the impracticability of reproducing it in the record.

The witness further testified that plaintiff's Exhibit No. 9 for identification was the ledger sheet of the account in the bank and reflected the bank account of said L. Simmons. The same objection to the reception of this exhibit in evidence was made by the defendant and the court placed the same limitation upon its reception that he had to Exhibit No. 10. Said Exhibit No. 9 is separately certified to the Circuit Court of Appeals because of the impracticability of reproducing the same in the record.

(Testimony of Herbert J. Nolan)

The witness further testified that he did not know whether L. Simmons ever came back in the bank after that time; that he didn't remember whether R. E. Taylor ever came back in the bank after that time.

HERBERT J. NOLAN,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

That he was a commercial artist and drew sketches for commercial purposes and was engaged in business during the month of May, 1933; that he knows the defendants R. E. Taylor and James S. McKnight; that he knows a man by the name of Al Ringer; that he saw him in 1933; that he had a conversation with Mr. McKnight at his headquarters in 1933; that he went there at the request of and with Mr. Ringer in May; that Mr. McKnight merely came out in the hall and was introduced to him; that he did not see Mr. Taylor at that time; that he had a conversation with Mr. Ringer upon the occasion of this visit to Mr. McKnight's headquarters; that it was in regard to some art work for political purposes; that he believes that Mr. Stein was the man who gave him an order for a drawing for political purposes; that plaintiff's Exhibit No. 8 for identification was his drawing, that is, "the illustration and the legend on the margin"; that Mr. Stein gave him the directions to make that type of drawing; that he did not converse with reference to the drawing appearing on Exhibit No. 8 for identification with any other person than Ringer and Stein, and didn't think Mr. Ringer had much to say about it; that he did not meet Mr. McKnight when he was at the headquarters in

(Testimony of Herbert J. Nolan)

connection with "these drawings"; that he doesn't remember any discussion with him.

"Q Now, what was the ultimate result of your drawing? Was it accepted or rejected?

A It was accepted.

MR. JONES: I object to that as calling for a conclusion of the witness. I would like to have the conversation.

THE COURT: The objection is overruled.

MR. JONES: Exception."

The witness further testified that he was paid for the drawing and that he thought Mr. Taylor handed him the check; that he had a record with him of the work and type of work that he did; that it was "just drawing and lettering, drawing from one of their stickers". The witness identified two checks under date of 5/16/33 and 5/23/33 as check which he received as compensation for has services; that he does not know the person (L. Simmons) whose name appears thereon; that he cashed both of the checks at the bank upon which they were drawn. The defendant McKnight objected to the reception of the same in evidence upon the ground that no foundation had been laid to show that he had authorized the giving of the checks or had anything to do with them. The court overruled the objection, to which the defendant McKnight noted an exception.

(Testimony of Herbert J. Nolan)

Plaintiff's Exhibit No. 12 is in words and figures following:

(Check) No. 140

Los Angeles, Cal. 5/23/1933

PAY TO THE ORDER OF H. J. NOLAN - - - $17.50
SEVENTEEN & 50 100, - - - - - - - - - - DOLLARS
Wilshire LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd. Los Angeles. (Signature torn off)
(Endorsed on back)
H. J. Nolan

– – –

(Check) No. 108

Los Angeles, Cal. 5/16 1933

3 W. L. B. May 16, 1933
16-303

PAY TO THE ORDER OF H. J. NOLAN, - - - $12.50
Twelve & 50/100 - - - - - - - - - - - - - - DOLLARS
Wilshire LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd., Los Angeles

L. Simmons.

(Perforation)
PAID 5 16 33
(Endorsed on back)
H. J. Nolan."

(Testimony of Harold H. Gartner)

The witness further testified that he had seen a part of the same drawing appearing on plaintiff's Exhibit No. 5 for identification. Referring to the card, plaintiff's Exhibit No. 5 for identification, the witness was asked if the card was printed "in that shape by you", and answered, "No, sir, I didn't do that. Q. You didn't do the address? A. No, sir, I just made the drawing. This has the same drawing as the other exhibit that was shown me. When I had perfected the drawings I brought them to Mr. Stein's office and submitted them for inspection"; that he thought he submitted them to Mr. Stein for inspection by Mr. Stein and Mr. Ringer. "Q. Can you tell the jury whether or not at the time you were in the office Mr. McKnight looked over either of these drawings? A. Yes, sir, he saw them"; that he had a pencil sketch in rough draft; that he did not recall that Mr. McKnight made any comment; that the drawings were finally submitted to Mr. Stein and Mr. Ringer; that Mr. Stein's office was in the headquarters of Mr. McKnight at 6300 Wilshire Boulevard.

HAROLD H. GARTNER,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That he was the general manager of the Excel Printing and Lithograph Corporation located in the City of Los Angeles; that he knew the defendants R. E. Taylor and James S. McKnight; that he had business transactions with Mr. McKnight or Mr. Taylor in the year 1933; that it had to do with a check that came back "insufficient funds"; that he knows a man by the name of Ringer;

(Testimony of Harold H. Gartner)

that he had business contact with Ringer in the year of 1933 with reference to the McKnight campaign for City Council. "Q. Did you have any conversation with Mr. McKnight in the year 1933 with reference to printing? A. Once, with reference to a check". The witness further testified that the check was for printing cards, "a business card, a mailing card". "Q. I show you here, Mr. Gartner, a piece of paper and ask you if this is like, similar to, or is the same type of printing that you did? A. I think that is a sample, that is one of the job tickets"; that it was this printing that he had the conversation with Mr. McKnight concerning the money; that Mr. Taylor gave him the purchase order for the printing; that he was directed to print 30,000 and after they were printed he delivered them, in part, to an address in Hollywood and the remainder on 24th Street in Los Angeles; that he didn't know the people's name to whom they were delivered; that he didn't remember the address, that "it was about half a block West of Vermont on 23rd or 24th Street; Q. I show you here a piece of paper and ask you to look at it and state whether or not you have seen that before? A. Yes, sir, that was an order for the cards"; that he did not know who the person was who put the initials appearing upon the order; that Mr. Taylor handed the order to him; that it was handed to him at the office on Wilshire Boulevard out at Carthay Circle; that Mr. Taylor did not give him the check for the amount of the order; That "the check was in an envelope"; "Q. I show you what purports to be a check and ask you if you have ever seen that before? A. Yes, sir"; that he received it in an envelope at the office; that either Mr. Robertson or Mr. Taylor gave it to him and that he put it in the

(Testimony of Harold H. Gartner)

bank; that it was then that he had a conversation with Mr. Taylor concerning the payment of that $61.50 check; that Mr. Stein and Mr. Robertson were present; "Q. With whom did you converse? A. Mr. Stein was there when I went out there and he telephoned, and pretty quick the money came out by messenger for the check"; that he thought it was Mr. Taylor who phoned to Mr. McKnight; that Mr. McKnight did not come out; that Mr. Taylor said he would call Mr. McKnight up and that he remained there a while and then a messenger came with $61.50. "Q. I show you this paper that I have shown you before, that is the first thing you did for Stein which was delivered at the time Taylor and McKnight paid you the $61.50. MR. JONES: That is objected to as calling for a conclusion of the witness, leading and suggestive. THE COURT: The objection is overruled. MR. JONES: Exception. A. Yes, sir. MR. DICKSON: I offer this piece of paper in evidence as government's Exhibit next in order as part of the conspiracy charge." To the reception of the piece of paper in evidence the defendant objected upon the grounds that no foundation had been laid, "not made in his presence, not shown to have been authorized by him in any manner, incompetent, irrelevant and immaterial. THE COURT: The objection is overruled. MR. JONES Exception."

Plaintiff's Exhibit No. 13 is a cardboard folder upon which appears four times the following text:

(Testimony of Harold H. Gartner)

"DEFEAT CUNNINGHAM FOR COUNCIL

We Protest His only qualification as candidate appears to be his association with the University of California at Los Angeles. Inasmuch as that association has not been a happy one, we are appealing to you to defeat this man who depleted our student body finances—and now seeks public office!

HERE ARE THE FACTS:

Cunningham was dismissed as manager of student affairs when the student body found itself without funds—and facing a deficit of $126,000.00.

We object to his attempt and that of his political backers to capitalize upon the dignity and good name of U. C. L. A. It took 9 years to do it.

God help the taxpayers if he's elected councilman.

ALUMNI PROTEST LEAGUE
University of California at Los Angeles"

EXAMINATION BY THE COURT

"BY THE COURT: Referring to that house on E. 23rd Street, what was that on East 23rd St.?

A. That was an apartment house."

The witness further testified that there was a man and a woman there and that he thought that some young lady invited him in the house. "Q. Would you remember the

(Testimony of Harold H. Gartner)

name of the person that was there if you heard it? A. All I remember was that somebody said to take so many out there and so many to Hollywood and I checked them on my order and made the delivery. It was a two-story stucco apartment with about three apartments in it and the other building was a double bungalow."

Thereupon the plaintiff offered in evidence its Exhibit No. 8 for identification. The defendant objected to the reception of said exhibit in evidence upon the grounds that no foundation had been laid and that it was irrelevant and immaterial, and upon the further ground "that it is hearsay so far as he is concerned, not binding upon him, not having been shown that he authorized it". The objection was overruled, to which the defendant noted an exception. Because plaintiff's Exhibit No. 8 is identical in substance and text as plaintiff's Exhibit No. 13 appearing hereinabove, the same is not reproduced here.

"MR. DICKSON: We also offer in evidence the piece of paper that this witness testified was an order for the printing.

MR. JONES: The defendant McKnight objects to that upon the ground that it was never authorized by him and incompetent, irrelevant and immaterial." The objection was overruled and an exception noted. Said piece of paper was received in evidence and marked plaintiff's Exhibit No. 14, and is in words and figures following:

(Testimony of Harold H. Gartner)

"PURCHASE REQUISITION

Los Angeles, Calif.
No..... May 19, 1933
To Excel Printing Co. 417 Wall Street
Please furnish the following:
Stock and printing of 30 M second
post cards 4½"x 6½"
Definite price $61.50

Ordered by .....
Approved: R. E. T."

"MR. DICKSON: We offer in evidence check dated May 27, 1933 payable to Excel Printing Company in the sum of $61.50 drawn on the Seaboard National Bank, Wilshire and LaBrea Branch, endorsed by this witness, and referred to by him in his testimony.

MR. SMUCKLER: The defendant Taylor objects to it on the ground it is incompetent, irrelevant and immaterial, not within the issues in this case and no foundation laid, does not tend to prove or disprove any of the charges in the indictment.

MR. JONES: The defendant McKnight joins in the objection."

Upon examination by the court the witness testified that he did not know whether the signature was torn off when he last saw the check; that he didn't remember what condition it was in; that the check was deposited in the bank, but when it was deposited that it was in the same mutilated condition *that is* in now.

(Testimony of Harold H. Gartner)

THE COURT: Objection overruled.

MR. JONES: Exception.

Thereupon said check was received in evidence and marked plaintiff's Exhibit No. 15, and is in words and figures following:

"No. 128

Los Angeles, Cal. 5/22/1933

PAY TO THE ORDER OF Excel Ptg Co. - - - - $61.50

Sixty one & 50/100, - - - - - - - - - - - DOLLARS

Wilshire LaBrea Branch

To SEABOARD NATIONAL BANK 16-303

5501 Wilshire Blvd., Los Angeles

(Signature torn off)

(Endorsed on back)
Excel Printing Co.
Harold H.Garten
Arts Printing Co.
Harold H.Garten
(several rubber stamps one over the other)"

Further examination by the court:

"When you received the check was it in the same mutilated condition as it is in now?

A. No, sir. It had the signature on it."

The witness further testified that he took the check to the office and he thought he gave it to Mr. Taylor; that at that time it still had the signature on it.

(Testimony of Harold H. Gartner)

CROSS-EXAMINATION

The witness further testified to his visit to the campaign headquarters regarding the payment of the check which had been returned "insufficient funds"; that he saw Mr. Taylor and Mr. Stein. "Q. And at that time Mr. Taylor told you he would phone Mr. McKnight? A. No, sir. He told me he was going to phone and he went in the outer office and then he came back and said a messenger was on the way out with the money". He further testified that several hours later a messenger came out with the money; that he was in the office when the messenger came and when he got the money he returned the check to Mr. Taylor at that time; that he never had a talk with Mr. McKnight except about the check; that he didn't telephone Mr. McKnight about it; that Mr. Taylor and Mr. McKnight were both standing in the doorway of the office when the messenger came in; that the messenger handed the money to Mr. Taylor, who in turn handed it to Mr. McKnight, who handed it to the witness; that he then handed the check back to Mr. Taylor; that Mr. McKnight arrived at the office before the messenger; that he never heard Mr. Taylor phone Mr. McKnight and he didn't know whether he did or not. Mr. Taylor said he was going to; that Mr. McKnight came into the office about fifteen or twenty minutes before the messenger; that the conversation he had with Taylor when he said he was going to the telephone occurred about 2 o'clock, and a couple of hours later he got his money; that Mr. Mc-

(Testimony of Harold H. Gartner)

Knight didn't say anything; that all he remembered that Mr. McKnight said was "How do you do"; he didn't remember anything that was said when the money was handed to him. The conversation concerning the check and the receipt of the money was either the latter part of May or the early part of June.

RE-DIRECT EXAMINATION

Do you believe that the printed matter which was to be put on "these cards" came over from "the Metropolitan Engraving Company"?

BY THE COURT: When you took this matter on the street, on 23rd Street, did you know what the matter contained, that was contained in the package?

A. I knew it was postcards.

The witness further testified he knew this because there was one on the outside of the package; that he could not tell now what was on the cards; that if he read every job that came down he would be busy reading jobs, "I didn't know what was on the card; there was some printed matter on it and some drawing"; that he first saw plaintiff's Exhibit No. 13 when he delivered the cards on 23rd Street. "Q. You are able to say that was a facsimili? A. Yes, sir, I know the card. I don't know what was on it; I can't identify the card.—I could identify the drawing, but I don't know exactly. I know there was a university on one side of it saying Cunningham was kicked out of office or something to that effect; something

(Testimony of Helen Moreland)

about a deficit of around a hundred thousand dollars." That the part of the work he did was the printing; that he first saw the printing when the engravers' plates came into the office; that he used the engraver's plates upon the press upon which the cards were printed; that he didn't do any of the printing, "naturally I know what mechanical work was to be done, all I did was to deliver the cards after the cards were completed. Naturally I kept the card that was on the job ticket, we keep a sample of every job that goes out".

HELEN MORELAND,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

That she was an employe of the Metropolitan Engraving Company and was office manager of said company in May, 1933; that she knows a man by the name of Al Ringer, but does not know Mr. Taylor or Mr. McKnight; that she saw Mr. Ringer in the month of May, 1933; that Mr. Ringer came in the office after he had placed an art order in the shop for a cut and asked for it; that they made a cut for Mr. Ringer and delivered it to the Excel Printing and Lithograph Company; that the messenger boy delivered it to the Excel Printing Company with which Mr. Gartner was connected; that she saw the cut before it was delivered; that she does not know where the original cut now is; that it is customary to deliver the original engraved cut to the person who ordered it; that they kept a

(Testimony of Helen Moreland)

press copy of it; that plaintiff's Exhibit No. 13 contains an impression of the cut made by them and was made from the cut; that the typed matter was not in the cut; that the illustration was there but all of the type work was set up by the typesetter; that none of the printed matter was upon that sketch when it left their establishment; that their firm was paid for this work as near as she can remember. "Q I show you here government's Exhibit No. 8 and ask you if you have ever seen this card before or anything similar to that heretofore? A. Yes, we made an electro for the original plate of that thing. I believe they brought the plate back and sawed off that part of it, I am not sure." The witness identified plaintiff's Exhibit No. 16 for identification, as two checks received by her company in payment for services rendered; that one of the checks was in payment of engraving and the other for the cut "that we cut off, the electro"; that they made out invoices for the work done.

The two checks, plaintiff's Exhibit No. 16, were received in evidence and marked plaintiff's Exhibit No. 16, over the objection of the defendant that no foundation had been laid for their reception in evidence, and that it had not been shown that they had been authorized by the defendant McKnight or given under his instructions or directions. The defendant McKnight noted an exception to the court's ruling.

Plaintiff's Exhibit No. 16 is in words and figures following:

(Testimony of Helen Moreland)

(Check)

"No. 106
Los Angeles, Cal. 5/16/1933
PAY TO THE ORDER OF
Metropolitan Engravers, - - - - $11.72
Eleven & 72/100, - - - - - - - - - - - DOLLARS
Wilshire LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd., Los Angeles
L. Simmons

(Perforation)
PAID 5 16 33
(endorsed on back)
Pay to the order of
Union Bank & Trust Co. of
Los Angeles
METROPOLITAN ENGRAVERS, Ltd.

(Check) No. 120
Los Angeles, Cal. 5/19 1933
PAY TO THE ORDER OF Metropolitan
Engravers, - - - - - - - - - - - - - - - $22.13
Twenty-two & 13/100, - - - - - - - - - DOLLARS
Wilshire LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd., Los Angeles L. SIMMONS
(perforation)
PAID 5/23/33
(Endorsed on back)
Pay to the order of
Union Bank & Trust Co.
of Los Angeles
METROPOLITAN ENGRAVERS, LTD."

(Testimony of Rodman Robeson)

The witness further testified that Mr. Ringer told her not to mail any bills, that he would pay them himself; that she was instructed not to mail the bill out by Mr. Ringer.

"Q BY THE COURT: Before we leave that subject, were the bills paid that way?

A Yes, sir, there was not any question; there was only one that ran over. Mr. Ringer generally paid in a few days; he used to come in after them.

Q He came personally and delivered the checks to you there?

A Yes, sir."

CROSS-EXAMINATION

That there were several jobs done there, some of which were paid in cash and some by check; they were brought in by Mr. Ringer and Mr. Ringer brought the money either in the form of a check or cash; that she couldn't exactly say what those checks were for; that she would have to refer to the invoices; that the orders that came in there were tendered to her; that she did not know Mr. Taylor or ever had any conversation with him.

RODMAN ROBESON,

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

That in May, 1933, he was employed by the defendant McKnight; that he performed political work in the office during his campaign for reelection as councilman; that the offices were located originally at 6300 Wilshire Blvd. at the corner of McCarthy Drive; that he worked for Mr. McKnight five weeks; that he knows the defendant Taylor and also Mr. Stein, both of whom were working at the campaign headquarters.

(Testimony of Rodman Robeson)

"Q. Can you give us some general description of the arrangement of the office there?

A. The entrance to the building was in the middle of a large room, approximately 15 or 18 feet deep and 24 or 26 feet long, the doorway being, the entrance door being in the middle of the 26 feet, the 24 to 26 feet in length. Leading out of one corner, diagonally from the front door on the right, was a small door leading into a hallway which extended back, oh, approximately 30 feet, and from this hallway on the right hand side there were three rooms and a bath room."

That he went to work for Mr. McKnight early in May, 1933, immediately following the closing of the primary campaign; that on the 2nd or 3rd day after his employment he was given instructions by Mr. Taylor that in addition to the precinct work that he was employed for originally he was to look after the accounting of the office; that nobody signed the checks up there for the salary and expenses in the campaign; that nobody to his knowledge signed the checks to pay the employes in the campaign for Mr. McKnight; that he received instructions concerning his work from Mr. McKnight the second or third day after his employment; that he was instructed to take charge of the precinct work.

"Q. I show you here Government's Exhibit 8, and ask you to look at that, the subject matter of that, have you ever at any time seen the subject matter of any such card as that at the headquarters out there, Mr. Robeson.

A. Yes, sir."

The witness further testified that he saw the subject matter during his employment there, approximately the 15th or 20th of May, 1933; that he never received any

(Testimony of Rodman Robeson)

instructions from Mr. McKnight or Mr. Taylor regarding the subject matter appearing on plaintiff's Exhibit No. 8; that he received instructions from Mr. McKnight several times during his employment concerning cards.

"Q Now tell us what cards you have reference to?

A. Well, I know as one of my duties I made a request for cards to be used—I made a request for a number of cards, cards for automobiles, and employment cards that were signed by the employes to be approved by the office, and cards of various descriptions."

The witness further testified that the initials appearing on plaintiff's Exhibit No. 14 are those of R. E. Taylor; that he received instructions from Mr. Taylor concerning cards; that at the beginning of his employment he was instructed to have an employe's card made out by every person in the employ of the campaign, but he didn't think he was ever instructed by Mr. Taylor to buy any other cards; that during the course of his employment approximately between the 10th and 20th of May, he was instructed by Mr. McKnight "to make out a request for the printing of cards"; that he knew a Miss Hart; that he was instructed by Mr. Stein to pick up some cards that were delivered to her house, some postcards and several large bundles; that he took them to an address in Hollywood; that plaintiff's Exhibit No. 1 is not a fac simile of the cards that he was told to pick up from Miss Hart and deliver to the Hollywood address. Plaintiff's Exhibit No. 8 is a fac simile of the cards that he picked up from

(Testimony of Rodman Robeson)

Miss Hart. That Mr. Stein further instructed him to go back to the Hollywood address the next morning and help destroy them.

The witness further testified that he observed Mr. Taylor daily about the headquarters.

"Q. What did you observe that he did in the ordinary course of business in the office?

A. Handled the finances of the campaign.

Q. He handed out the checks to the employes?

A. No checks were handed.

Q. Did you ever see anyone paid up there for their work?

A. Yes, sir. Paid in cash.

Q. BY THE COURT: Who made the payments, if anyone, out there?

A. I made them myself. Those payments were for salary.

Q. That was the only kind of payments made at the campaign headquarters?

A. No, sir; bills—daily we submitted to Mr. Taylor a list of requisitions that had been approved which were ready for payment."

That checks were made out for the amount called for by Mr. Taylor; the checks already were signed; the signature appearing on the checks was that of L. Simmons; that Mr. Taylor would look over the statement submitted to see if it had the proper approval, sometimes he would write the checks to cover and other times he would state

(Testimony of Rodman Robeson)

he didn't have the money, that the bills could wait a day or so; that on the occasions that he wrote checks he would make a complete notation in his check book; that the majority of instances Taylor handed him the check and the requisition. "Q. BY THE COURT: So that on all of these occasions all that Mr. Taylor did with those checks that were signed by some person, you simply submitted your statement to him and he would fill out the body of the check, the subject matter, as appeared thereon, and hand you the check with the signature and the statement? A. Precisely."

The witness further testified that at the time he was going out to destroy the cards mentioned that he had a talk with Mr. McKnight; that Mr. McKnight started to give him instructions regarding some particular work he wanted done and "I told him I had a job for Mr. Stein" and he told him what it was and Mr. McKnight said "Oh."

The witness identified plaintiff's Exhibit No. 17 for identification as four checks that he had received from Mr. Taylor in the campaign headquarters and that the endorsement appearing on the back of each of the checks respectively was his own; that the checks were reimbursements "for work in connection with the purchase of supplies, etc." in connection with the McKnight campaign at campaign headquarters.

Plaintiff's Exhibit No. 17 is in words and figures following:

(Testimony of Rodman Robeson)

(Check) "No. 104

Los Angeles, Cal., 5/16 1933

3 W. L. B. May 16, 1933

16-303

PAY TO THE ORDER OF R. ROBESON - - - - $5.89

Five & 89/100 - - - - - - - - - - - DOLLARS

Wilshire LaBrea Branch

To SEABOARD NATIONAL BANK 16-303

5501 Wilshire Blvd., Los Angeles L. SIMMONS

(perforation)

PAID 5 15 33

(endorsed on back)

R. ROBESON

(Check) No. 118

3 W. L. B. May 18, 1933

16-303 Los Angeles, Cal. 5/18/33

PAY TO THE ORDER OF R. ROBESON, - - - $6.12

Six & 12/100, - - - - - - - - - - - DOLLARS

Wilshire LaBrea Branch

To SEABOARD NATIONAL BANK 16-303

5501 Wilshire Blvd., Los Angeles L. SIMMONS

(perforation)

PAID 5 18 33

(Endorsed on back)

R. ROBESON

(Testimony of Rodman Robeson)

No. 107

3 W. L. B. May 16 1933 Los Angeles, Cal. 5/16/33
16-303

PAY TO THE ORDER OF R. ROBESON, - - - $6.00
Six & no/100, - - - - - - - - - - - DOLLARS

Wilshire LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd. Los Angeles L. SIMMONS

(perforation)
PAID 5 16 33

(endorsed on back)
R. ROBESON

- - - -

No. 111

Los Angeles, Cal. 5/16 1933

3 W. L. B. May 16 1933
16-303

PAY TO THE ORDER OF R. ROBESON - - - $20.00
Twenty & no/100, - - - - - - - - - - DOLLARS

Wilshire LaBrea Branch
To SEABOARD NATIONAL BANK 16-303
5501 Wilshire Blvd., Los Angeles L. SIMMONS

(perforation)
PAID 5 16 33

(endorsed on back)
R. ROBESON"

(Testimony of Rodman Robeson)

The witness further testified that Mr. McKnight told him that Mr. Tayor's capacity was that of "fiscal agent"; that Mr. Taylor's instructions were that "nothing was to be purchased except with his approval or with the approval of Mr. McKnight"; that the requisitions in most cases were given to him, when he typed them in the form "which I have identified and submitted them to the person asking for them for his signature and in some cases I didn't get that signature and I signed his name for him and I then submitted them to Mr. McKnight on the following morning for approval; the goods were ordered and upon receipt of the goods I okayed the bill and attached the requisition and endeavored to get a check for payment"; that the bill and requisition went to Mr. Taylor; that Mr. Taylor either issued the check at the time or held it for payment in his office.

"Q BY THE COURT: Did you ever at any time have any requisition go through for cards containing the subject matter of the exhibit I now show you, Government's Exhibit No. 1?

A I couldn't state that I definitely—May I have that question again?"

The witness further testified that he *purchase* 2000 postal cards at the United States Post Office at the branch at LaBrea and Wilshire; that he couldn't state who instructed him to make the purchase; that he was instructed to complete the purchase of cards for "getting out of the mailing list, and to see that they went out"; that when he purchased the cards he took them back to the office and he distributed them to the people working in the office to get out the mailing list; that he did not give Miss Hart any of these 2000 postal cards. The witness further testi-

(Testimony of Rodman Robeson)

fied *that gave* Miss Hart some blank cards to take home and address, although they were blank postal cards; that he gave her a mailing list containing the names of the registered voters in a given precinct and the approximate number of cards; that when she had finished "the job I gave her back her receipt for it"; that to the best of his knowledge when the cards were returned the addresses were not typewritten but "hand written"; that there was nothing on the back of the cards at that time; that he put nothing on the back of the cards later; that he collected them and stored them until he was asked for them; that he couldn't say who asked him for them, but that he delivered them to Mr. Ringer; that he did not afterwards receive them again.

"Q Is that the same man that went down to the post-office with Miss Hart, you have been setting here and heard the testimony?

A. Last Friday, yes, sir.

Q. That was the same fellow?

A. Yes, sir."

The witness further testified that plaintiff's Exhibit No. 18 for identification was given to him by Mr. Taylor at the office at 6300 Wilshire Boulevard, the latter part of May, with instructions to take it to the bank; that he went to the bank and endeavored to get all of the cancelled checks. Plaintiff's Exhibit No. 18 is in words and figures following:

"May 29th, 1933.

Seaboard Natl. Bank,

Gentlemen:

Kindly deliver to bearer, all of my cancelled checks to date.

L. SIMMONS"

The witness further testified that the date following his first visit to the bank he obtained the cancelled checks; that he didn't examine them to see if they were intact; that he also received the bank's statement along with the cancelled checks.

CROSS-EXAMINATION

The witness further testified that Mr. McKnight told him shortly after he went to work that Mr. Taylor was going to be in charge of finances of the campaign. That he was instructed by Mr. Stein to go out and destroy cards which were true replicas of Exhibit No. 8 and Exhibit No. 5; that he assisted in destroying Exhibit No. 5; that Exhibit No. 8 was destroyed, that is, all of the replicas; that they were never used in the campaign so far as he knew and were never put in the mails directly or otherwise; that on the morning he went out to destroy the replicas of Exhibit No. 8 he informed Mr. McKnight that he had something to do for Mr. Stein and that all that was said by Mr. McKnight was "Oh".

The witness further testified that there was a certain circumstance in which it was revealed to him that Mrs. R. E. Taylor was L. Simmons; that Mr. Taylor in Mrs. Taylor's presence handed him a check bearing the endorsement of "L. Simmons" which purported to be a campaign

(Testimony of Rodman Robeson)

contribution; that he was instructed to deposit it in the bank on his way back to the office; that he deposited the check at the Seaboard National Bank at Wilshire and LaBrea in the name of "L. Simmons"; that subsequently to that time he was informed that L. Simmons was Mrs. Taylor's name before she married Mr. Taylor; that he made deposits three or four times in the name of "L. Simmons".

"BY THE COURT: Who did you see at this house on Hollywood Boulevard when you destroyed these cards that were out there?

A. There was a lady whom I didn't know that was porported to be Mrs. Stein".

That when he arrived at the address there was a person there burning the cards and "I jumped in and helped that person"; that he had never see that person at any other place; that the type of card he saw there was approximate 5 by 7 and that most of them had been addressed in pen and ink to various persons and there was printed matter and illustrations of the type commonly known as "correspondence type"; that he never saw any of those cards of similar import or a fac simile thereof at headquarters after that until they were presented in court.

MR. DICKSON: That is the government's case, your Honor.

The court thereupon withdrew from consideration of the jury the Fifth Count of the Indictment.

MR. SMUCKLER: I wish to make a motion for a nonsuit on the first count, and move for a dismissal on the ground that the government has not *prove* a case of conspiracy, and as to counts 2, 3, and 4 we make the same motion, because nowhere in the testimony have they shown that Mr. Taylor had anything to do with the matters charged in counts 2, 3, and 4.

MR. JONES: I desire to make a motion on behalf of the defendant McKnight, that the government be compelled to elect which count they will ask for a conviction on, that is one motion, and I further move in behalf of the defendant McKnight as to count 1, that the jury be instructed to return a verdict of not guilty upon the ground, and for the reason, that there is no showing of knowledge on the part of the defendant McKnight or that any agreement was ever entered into in violation of any law, and furthermore, on the further ground, that the evidence shows that there never was any agreement or understanding that the material contained on Exhibits 2, 3, 4, and 5, or that any of the material contained upon Exhibit 8, was to be placed upon a postal card and deposited in the United States mail, and for the same reasons also ask that the jury be instructed to return a verdict of not guilty against the defendant McKnight upon each and every one of the counts contained in the indictment.

THE COURT: I have already ruled on count 5. The motion for an election is denied.

MR. JONES: Exception.

THE COURT: The motion for a nonsuit as to each defendant will be denied.

MR. JONES: Exception.

MR. JONES: The defendant McKnight will offer no testimony. I would like to renew the motion I made yesterday.

THE COURT: The record will show that all motions are renewed and are denied.

MR. JONES: Exception.

Thereupon the court instructed the jury; said instructions being in full as follows:

Gentlemen of the jury, the Court instructs you as follows:

This case should be considered, and your deliberations should be carried on with a view to reaching an agreement without compassion, prejudice or sympathy for or against either of the defendants on trial.

There were originally three defendants who had submitted an issue to the Court upon the indictment that was found against them by the Grand Jury. One of those defendants, Stein, testified as a witness in the case before you, and he has disposed of his case, so far as you are concerned, and so far as his guilt is concerned now, by entering a plea of what the law calls nolo contendere. That means, substantially, gentlemen, that Stein came into court of his own volition and did not contend with the Government on the facts that it has charged against him. It is not just the same as a plea of guilty, but under that plea the Court has a wide discretion, the same discretion that it would have upon a plea of guilty so far as the imposing of sentence is concerned. In effect it is as I have stated, that the defendant Stein does not contend with the Government on the facts that are pleaded against him, but he does deny that he was guilty of the precise intent that the Government alleges; and the intent that is

alleged in these crimes that are charged against the three defendants is a felonious intent, an unlawful, criminal, felonious intent.

You are the sole and exclusive judges of the full effect of the evidence that has been addressed to you. You are the sole and exclusive judges of the credibility of the witnesses who have testified in the case, and the character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. You may scrutinize not only their appearance while upon the witness stand, but their relation to this case as well, and also their degree of intelligence. In determining the credibility of a witness you have a right to consider his bias or prejudice for or against any of the parties to the case, and the reasonableness or unreasonableness of his or her statements, the strength or weakness of his or her recollection and the fact that he or she has a feeling for or against the defendants or either of them who are now on trial, the defendants Taylor and McKnight by contradictory evidence, or by any other fact that enables you to arrive in your own mind as to the truth and veracity of the testimony of any of the witnesses who have testified in the case.

A witness false in one part of his or her testimony is to be distrusted in others, and when you are convinced that a witness has stated that which is untrue not as a result of mistake or inadvertence but wilfully with a design to deceive, you may treat all of the testimony of such witness with distrust and suspicion and reject it all unless you are convinced notwithstanding his or her base character that he or she has in other particulars sworn to the truth.

The defendants are accomplices in the acts that are charged in the second or fourth counts of the indictment. They are co-conspirators in the acts that are charged in the second count of the indictment. An accomplice is one who knowingly joins with another in the intentional commission of a criminal offense. While you should scan the testimony of an accomplice and a co-conspirator with great scrutiny nevertheless if you believe it, if you are satisfied beyond a reasonable doubt as to its verity, you have a right to act upon it, even to the extent of finding a verdict of guilty against a person in the federal court, because the rule in the federal court is not that testimony of an admitted accomplice or co-conspirator must be corroborated by other evidence, but it may be sufficient if you believe it, if it satisfies you beyond a reasonable doubt of its truthfulness to warrant you in a finding of guilty upon such testimony, even though it is uncorroborated. The full effect of the evidence, however, is for you, and the credibility that you give any witness is for you. You must determine that according to your own conscience and judgment under the rules of law as stated in this charge.

The defendant McKnight has not seen fit to take the witness stand. Now, you must leave that out of consideration. You must draw no deduction or inference because of the fact that he has failed, as is his privilege and right to take the stand, because he may exercise that privilege and right if he chooses. The jury is not to draw any inference or indulge in any presumption because of the fact that he has seen fit to exercise his constitutional right not to take the witness stand in his own behalf. *It* has exercised his constitutional right to remain silent and

the law gives that to any man who is charged with a criminal offense.

The testimony of the defendant Taylor is not to be weighed, judged or analyzed or considered by any test or rules other than those you have been instructed to apply to the testimony of other witnesses who have testified in the case with the exception of the testimony of the witness Stein, and the Court has given you specific instructions concerning his testimony, and in your consideration of the testimony of the defendant Taylor it is not to be weighed or considered or determined by any other rule than the rule that you have been instructed to apply to the testimony of all witnesses who have testified in the case. The same presumptions are to be implied in favor of the defendant Taylor as you have been instructed to apply to the testimony of every witness who has testified in the case other than the witness Stein.

The first count in the indictment, gentlemen, we have been discussing all the counts in the indictment, but the first count of the indictment is brought under a section of the Federal Criminal Code and Act of Congress that is known as Section 37, which in so far as it is applicable here reads as follows: 'If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose or one or more of such parties do any acts to effect the object of said conspiracy, each of the parties to such conspiracy shall be punished in the manner and form as prescribed in the statute.' Now, the first count charges a conspiracy, a conspiracy to violate a certain other law of the United States, and a certain other Act of Congress. That Act of Congress is known as Section

212 of the Criminal Code of the United States, and in so far as that statute is applicable to this case it reads as follows: 'All matters otherwise mailable by law upon the envelope or outside cover or wrapper of which or any postal card upon which any delineation epithet, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threating character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office, nor by any letter carrier, and shall be withdrawn from the mails under such regulation as the Postmaster General shall prescribe. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be nonmailable matter or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same shall be punished in the manner and form as prescribed in the statute.'

Under the language as contained in the first count of the indictment you are instructed that it charges conspiracy between four persons, other persons who are alleged to be unknown to the Grand Jury but in so far as the evidence in this case has been produced it refers to four persons, McKnight, Taylor and Stein, and another man named Ringer, Al Ringer. Al Ringer is not named as a defendant in the indictment, but the Grand Jury classifies him as a co-conspirator. In other words, it is alleged in count 1 in the indictment that these four men

entered into a conspiracy to use the mails of the United States in a manner denounced by the statute which I have read to you concerning nonmailable matter, and that certain overt acts were committed in furtherance of that common object and understanding that is alleged to have been entered into and agreed to be the four men.

I have read to you the definition of conspiracy that where two or more persons united together unlawfully to violate a law of the United States, and anyone of them commit an overt act in furtherance of the same common understanding or agreement they are all guilty of the crime of conspiracy.

There are certain overt acts alleged in the first count of the indictment, gentlemen, that I will not read to you. If there is no objection on the part of the defendant, I will permit you to take the indictment to your jury room with you and examine it.

Suffice it to say at this time that there are a number of overt acts alleged. Some of them there has been evidence directly to establish and others there has been no evidence directly to establish. You will bear in mind those things when I read to you the instructions concerning the first count in the indictment.

Now, the fifth count in the indictment, gentlemen, is not before you. The Court has withdrawn that from your consideration because of the insufficiency of the evidence to show the mailing in respect to that postal card as set out in the fifth count of the indictment so that you will not give it any consideration.

The second, third and fourth counts of the indictment do not charge the defendants either Taylor or both Mc-

Knight and Taylor with conspiracy, but they charge them with a violation of the Acts of Congress that I have read with respect to nonmailable matter. So that you will observe and you are instructed to observe the difference between the charge that is contained in the first count of the indictment which charges these men with conspiracy to violate this nonmailable, so-called, statute, of the United States, and the charge that is contained in the second, third and fourth counts of the indictment which does not charge them with conspiracy to do so but charges them with actually having done so. Bear in mind that difference.

There is a principle of law that you are instructed to apply in this case if you believe from the evidence its application is relevant and that is the principle of aider and abetter or principal and accessory. The statute says that any person who assists any person to mail or cause to be mailed any of the nonmailable matter that is denounced by the Act of Congress shall be amenable to the law as has been read to you from the statute. Any person who aids, abets, counsels, encourages or assists or procures another to commit a criminal offense if he does so intentionally and knowingly shall be prosecuted and tried the same as the principal, so that one who knowingly and intentionally participates with another in the commission of a criminal act, or who knowingly aids, counsels, encourages, or procures another to commit an act constituting a criminal offense is to be dealt with as is the principal himself.

The law under which the first count of the indictment in this case is drawn provides that when two or more persons conspire any offense against the United States and one or more of them does any act to effect the object

of the conspiracy each of the parties to such conspiracy is guilty.

In order to establish the crime charged it is necessary to prove first that the conspiracy or agreement to commit the particular offense against the United States as alleged in the indictment be established, and secondly, to prove further that one or more of the parties engaged in the conspiracy has committed some act with respect to effecting the object thereof as alleged in the first count of the indictment.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful adventure or scheme, or that they should directly by words or in writing state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons in any manner, or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design.

Now, the common and unlawful design that is charged in the first count of the indictment that McKnight, Taylor, Stein and Ringer entered into was the mailing or delivery of the non-mailable matter that is set out in that count of the indictment and that is described in the statute I read to you concerning non-mailable matter.

In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end work together in any way in furtherance of the unlawful scheme every one of said persons becomes a member of the conspiracy.

The success or failure of the conspiracy is immaterial, but before the defendants or either of them may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as charged in the first count of the indictment, and that the defendants now before you or either of them or both of them were active parties thereto.

In order to warrant you in finding a person guilty of the offense charged, or either of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the first count of the indictment was entered into between two or more of the defendants and one of the defendants and one Al Ringer to violate the law of the United States in the manner described in the indictment, that is to say, to specifically violate Section 335 of the Criminal Code of the United States as read to you.

It is necessary further that in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction beyond a reasonable doubt that one or more of the overt acts described in count 1 of the indictment was done by one or more of the defendants, or at their direction, or with their aid, the defendants now on trial.

Under the charge made in count 1 of the indictment the conspiracy constitutes the offense and it must be made to appear from the evidence beyond a reasonable doubt before either defendant now on trial can be convicted that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact

that either or any of the defendants named may have been engaged in the performance of any of the acts charged in the indictment as overt acts would not authorize the conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged here is made out.

Each party to a conspiracy must be actuated by an intent to promote the common design.

I have previously stated in the charge, and now restate in the charge, that the common design alleged to have been the single purpose or agreement or understanding of the two defendants now on trial with others charged in the first count of the indictment was to violate the United States statute concerning nonmailable matter.

If persons pursue by their acts the same unlawful object, one performing one act and the second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be an intentional participation in the transaction with a view and purpose to further the common design. If a person understanding the unlawful character of a transaction encourages, advises or in any manner with a purpose to forward the enterprise or scheme assists in its prosecution, he becomes a conspirator. And so a new party coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction to the unlawful combination, as well as the acts done afterwards. Joint assent and joint participa-

tion in the conspiracy may be found like any other fact as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design or by the parties abandoning the same, evidence of acts or declaration thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of a conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence and if it appears to you as reasonable men that even though there is no direct evidence of the actual participation in the alleged offense by the defendants, or either of the defendants, a reasonable inference from all the facts and circumstances does to your mind beyond a reasonable doubt show that the defendants or some of them were parties to the conspiracy as charged you should make the deduction and find accordingly.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the thing which he did, but if any of the defendants with knowledge that the law was designed to be violated in the particular manner charged in the indictment aided in any way by affirmative action in the accomplishment of the unlawful act they would be guilty. To this statement there is one exception, and that is if before any overt act has been committed on the part of any conspirator or at his suggestion or with his aid and participation any such conspirator withdraws from the conspiracy and wholly disassociates himself from the project or the carrying out thereof he ceases to be a conspirator and is without guilt as such, and before you can convict either one of the defendants of the charge alleged in Count 1 the evidence must prove to your satisfaction beyond a reasonable doubt that the mailing of the matter referred to in count 1 of the indictment was done in pursuance of some plan or design previously agreed upon between such defendants and some one or more of the persons referred to in count 1 of the indictment as defendants or as conspirators. If you find beyond a reasonable doubt from the evidence that the defendant McKnight wrote any defamatory matter contained in any card, that unless you further find from all of the evidence that he at the time of writing any such matter contained in said cards, or approving the same, prior to the deposit of the postal card mentioned in counts 2, 3, and 4, he did so with full knowledge upon his part that said matter was to be printed upon said postal card and was intended to be placed in the United States mail for delivery as charged in said indictment, you cannot find the defendant McKnight guilty.

You are the sole and exclusive judges of the evidence as to whether or not any matter contained in any post card described in any count in this indictment is libelous and defamatory.

The evil character of the matter alleged to have been published on the post card must be reasonably apparent or discernible upon its face, and if you find that the matter contained on the post card is not objectionable on its face then you cannot search for an undisclosed motive or intent on the part of the person who compiled the post cards and sent them out in order to convict the defendant. The words libelous, scurrilous and defamatory used in the statute with which the defendants are charged, with having violated must be taken solely according to their ordinary meaning and said words are defined as follows:

Defamatory is defined by Webster as the taking of another's reputation, or words which produce any perceptible injury to the reputation of another are called defamatory.

Libelous is defined as meaning written words which impute that any person has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonorable conduct or has been accused or suspected of any such conduct, and words are libelous which hold any person up to the contempt, hate or scorne or ridicule and which thus engenders an evil opinion of an individual in the minds of right thinking men, tend to deprive him of their friendly intercourse and society.

You therefore must find beyond a reasonable doubt before you can convict any of the defendants that the language contained upon any post card introduced into

evidence and set forth in the indictment was defamatory or libelous or calculated and obviously intended to reflect injuriously upon the character or conduct of said Cunningham, and unless you so find your verdict must be not guilty as to each and every count contained in the indictment, as to each defendant or both of them.

And the essential elements of the offense charged in the conspiracy count in the indictment is that the defendant James S. McKnight actually intended to enter into an agreement with some one or more of the persons mentioned in count 1 of the indictment to do the things charged therein. Unless it is proved by the evidence beyond a reasonable doubt that the defendant James S. McKnight actually intended to do the things as charged in the indictment with some one or more of the persons mentioned as conspirators in the indictment, the defendant James S. McKnight should be found not guilty of conspiracy as charged in count 1 of the indictment regardless of what else, if anything, is established.

It is not sufficient for you to find that the defendant Robert E. Taylor engaged in some activity in connection with the preparation or mailing of the matter referred to in count 1 of the indictment, but you must go further and find before you can convict him of the charge alleged in count 1 that such activity that you may find he did engage in in that connection was done in pursuance of some common plan and design previously agreed upon between himself and some one or more of the other persons referred to in said count 1 of said indictment.

You are further instructed that in order to find the defendant Robert E. Taylor guilty of the offense charged

in count 1 of said indictment that the preparation and mailing for delivery of the matter referred to in said indictment was the result of a previously formed design, understanding or agreement between certain persons named in count 1 of the indictment as defendants or conspirators to cause said matter to be so prepared for mailing and mailed as charged in said indictment, and you must further find that the said Robert E. Taylor was one of the parties who entered into said common design or previous arrangement and unless you do so find beyond a reasonable doubt that the said Robert E. Taylor was one of the parties who conspired together and entered into such common design, plan or arrangement, it would be your duty to acquit the said Robert E. Taylor of the offense charged in count 1 of said indictment, even though you may find that said matter was caused to be prepared and mailed.

The gist of the offenses charged in each of counts 2 to 4 inclusive, is knowingly depositing or causing to be deposited for mailing or delivery of nonmailable matter and that said counts 2 to 4 inclusive, do not charge any offense for writing or compiling any alleged defamatory matter which may be contained therein, or in publishing in any manner other than by mailing or causing to be mailed the post cards, Exhibits 1, 3 or 4, any alleged defamatory matter of or concerning said Cunningham. In reaching a verdict in this case you should at all times observe this distinction and determine first whether the said McKnight wrongfully, wilfully, knowingly and feloniously did enter into an agreement or conspiracy with others to mail the post cards or any of them identified in this case as Exhibits 2 to 4. Unless the evidence convinces you be-

yond a reasonable doubt that he did mail or cause to be mailed the particular post cards set forth and described in each particular count of the indictment you must find him not guilty as to each particular count 2 to 4, inclusive, and unless you find beyond a reasonable doubt that he did mail or cause to be mailed any post card described in any particular count from 2 to 4 you must find him not guilty on any count wherein you find that he did not mail or cause to be mailed any post card described in said count. The offense charged in each of counts 2 to 4, inclusive, is knowingly depositing or causing to be deposited for mailing or delivery nonmailable matter as I have defined it, and you are instructed that counts 2 to 4, inclusive, do not charge any offense for writing or compiling any alleged defamatory matter that may be contained therein, or in publishing any alleged defamatory matter of and concerning the said Cunningham, except as it is charged that publication was made by mailing or causing to be mailed the postal cards, Exhibits 1, 3 and 4.

If after having heard all of the evidence there is a reasonable doubt remaining in your mind as to the guilt or innocence of the defendants, or either of them, then you should acquit them. It is not sufficient to establish a probability, even though a strong one, arising from the doctrine of chance that the fact charged is more likely to be true than the contrary, but the evidence must go further and establish the truth of the fact to a reasonable and moral certainty that convinces the understanding, and satisfies the reason and judgment of the jurors who are bound to act upon it conscientiously. While neither defendant can be convicted unless his guilt is established beyond a reasonable doubt, still the law does

not require demonstration, that is, such degree of proof as to exclude the possibility of error because such proof is rarely possible.

Now, gentlemen, when you retire to the jury room you will select one of your number as foreman. Your verdict must be in writing, signed by your foreman, and when found by you must be returned into court. It requires the unanimous concurrence of all the jurors to find a verdict.

Are there any exceptions, gentlemen?"

We except to the refusal of the court to give instruction No. 49 requested by the defendant James S. McKnight, for the reason that the matters therein suggested are a proper statement of the law and have not been by the court duly covered or presented to the jury in its giving of such instructions relating directly to the questions to be determined by the jury, and are necessary to properly aid them in their determination of the questions submitted for their consideration, and which instruction is as follows:

"You are instructed that you cannot find the defendant McKnight guilty on a mere suspicion, and evidence of mere relationship between him and other defendants or persons not named in this indictment does not establish that there was a conspiracy. In order to find the defendant McKnight guilty you must find that he intentionally participated in the transaction and that he had an evil motive in having said post cards, identified as Exhibits 2 to 5, inclusive, mailed out, and unless you so find your verdict must be not guilty as to the defendant McKnight."

We except to the refusal of the court to give Instruction No. 40 requested by the defendant James S. McKnight, for the reason that the matters therein suggested are a proper statement of the law and have not been by the court duly covered or presented to the jury in its giving of such instructions relating directly to the questions to be determined by the jury, and are necessary to properly aid them in their determination of the questions submitted for their consideration, and which instruction is as follows:

"The jury is instructed that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential substantial part of the law of the land and binding on the jury in this case as in all criminal cases and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant unless evidence in the case convinces the jury of his guilt as charged beyond all reasonable doubt.

We except to the refusal of the court to give Instruction No. 21 requested by the defendant James S. McKnight, for the reason that the matters therein suggested are a proper statement of law and have not been by the court duly covered or presented to the jury in its giving of such instructions relating directly to the questions to be determined by the jury, and are necessary to properly aid them in their determination of the questions submitted for their consideration, and which instruction is as follows:

"The presumption of innocence goes with the defendant throughout the whole trial, even till the verdict is rendered, and this presumption of innocence outweighs

and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt."

We except to the refusal of the court to give Instruction No. 50 requested by the defendant James S. McKnight, for the reason that the matters therein suggested are a proper statement of the law and have not been by the court duly covered or presented to the jury in its giving of such instructions relating directly to the questions to be determined by the jury, and are necessary to properly aid them in their determination of the questions submitted for their consideration, and which instruction is as follows:

"You are instructed before you can find the defendant McKnight guilty of Count One in the indictment that you must be satisfied from all of the evidence beyond a reasonable doubt that the defendant had actual knowledge and acquiesced and approved of the act of mailing said post cards, being Exhibits 2 to 5, inclusive, out, and that you cannot find him guilty unless the evidence convinces you beyond a reasonable doubt that there was an agreement to mail said Exhibits 2 to 5 out, and put the printed matter contained upon the post card upon the same. If the evidence does not satisfy you beyond a reasonable doubt that the defendant McKnight agreed with the other defendants named in the indictment or with others, that said printed matter now contained in said Exhibits 2 to 5 should be printed upon a post card on said exhibits and mailed out, then the defendant Mc-

Knight would not be guilty and you are further instructed that the defendant McKnight is not responsible for the conduct of other parties, if any there shall be found by you who mailed said post cards out, unless the evidence convinces you beyond a reasonable doubt that he did have knowledge and approve and acquiesce in the mailing out of said post cards.

We except to the refusal of the court to give Instruction No. 30 requested by the defendant James S. McKnight, for the reason that the matters therein suggested are a proper statement of the law and have not been by the Court duly covered or presented to the jury in its giving of such instructions relating directly to the questions to be determined by the jury, and are necessary to properly aid them in their determination of the questions submitted for their consideration, and which instruction is as follows:

"A reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. It is not sufficient to establish a probability, even though a strong one; arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must go further and establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satis-

fies the reason and judgment of the jurors, who are bound to act upon it conscientiously."

We except to the refusal of the Court to give Instruction No. 22 requested by the defendant James S. McKnight, for the reason that the matters therein suggested are a proper statement of the law and have not been by the Court duly covered or presented to the jury in its giving of such instructions relating directly to the questions to be determined by the jury, and are necessary to properly aid them in their determination of the questions submitted for their consideration, and which instructions is as follows:

"You are instructed that the presumption of innocence with which the defendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption, and to acquit this defendant unless the evidence in the case convinced you of his guilt as charged beyond all reasonable doubt."

Thereafter, on, to-wit, the 19th day of December, 1934, the jury in said cause retired to consider their verdict. Thereafter on, to-wit, said 19th day of December, 1934, said jury returned its verdict, finding the defendant James S. McKnight guilty on Counts 1, 2, 3, and 4 of said indictment.

That thereafter, on, to-wit, the 19th day of December, 1934, the court sentenced the defendant James S. McKnight to a term of imprisonment in the County Jail of Los Angeles County for sixty days, to pay a fine of $500.00, and to stand committed until the same is paid, on the first count, and a term of six months in the Los Angeles County Jail on each of Counts 2, 3, and 4, said terms to run concurrently. Said sentences on the second, third and fourth counts were suspended and the defendant placed on two years probation.

That thereafter, on, to-wit, the 18th day of January, 1935, upon cause appearing therefor, the court entered its order extending the time of the defendant James S. McKnight to present his Bill of Exceptions, which said order is in words and figures following:

"On the above stipulation, IT IS HEREBY ORDERED that the defendant James S. McKnight shall have, and he is hereby given, an extension of time and term until February 10th, 1935, in which to serve and file his bill of exceptions and assignment of errors in the above cause.

PAUL J. McCORMICK

Judge of the above Court."

And thereafter, upon the ..... day of ....., 1935, an order was duly entered of record, pursuant to stipulation of the parties hereto, that the original documents offered in evidence in said cause that are not herein reproduced be considered as incorporated and as a part of the

Bill of Exceptions in this cause as though actually a physical part thereof, and that the same be separately certified by the Clerk of this court to the United States Court of Appeals in and for the 9th Judicial Circuit of the United States.

Accordingly, the exhibits mentioned and in evidence herein, which are not set forth in this Bill of Exceptions, the same being separately certified by the clerk of this Court to the United States Court of Appeals in and for the 9th Judicial Circuit of the United States, are hereby incorporated and included herein and made a part hereof, the same as if actually herein set out in full. For as much as the matters above set forth do not as otherwise appear of record, this defendant tenders this, together with the said original exhibits, as his Bill of Exceptions which is all of the evidence received in said cause, and prays that same may be allowed, settled, signed and sealed by the Judge of this Court presiding at the trial, to-wit, by the said Hon. Paul J. McCormick, pursuant to the statute and the rules of court in such case made and provided, to be filed and made a part of the record herein, which is done according to law this 7th day of February, 1935, which is within the time provided for by the rules of court and statute appertaining thereto for the presenting, signing and filing of said Bill of Exceptions herein.

Paul J. McCormick
District Judge.

The foregoing Bill of Exceptions was presented this ..... day of February, 1935, before the said Hon, Paul J. McCormick, Judge of this court, by the defendant James S. McKnight, for the approval, signature and seal of said Hon. Paul J. McCormick; said Bill of Exceptions was delivered to the counsel for the United States for examination as said counsel, and the approval, signature and seal of the same was taken under advisement by said court.

Paul J. McCormick
District Judge

It is hereby stipulated by and between counsel for plaintiff and defendant in the above entitled action that the foregoing Bill of Exceptions is a true and correct copy of all of the evidence and exhibits offered.

Dated February 7th, 1935.

Charles H. Carr
United States Attorney
Counsel for plaintiff

Otto Christensen
Counsel for defendant

[Endorsed]: Lodged Feb 1-1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk Filed Feb 7-1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

STIPULATION RE EXHIBITS

IT IS HEREBY STIPULATED by and between counsel for plaintiff and counsel for the defendant, that respecting the exhibits mentioned in the proposed Bill of Exceptions filed herein, an order may be entered by this court certifying all of the original exhibits mentioned in said bill of exceptions which are not reproduced therein as a part thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

IT IS FURTHER STIPULATED that either party may withdraw any of their original exhibits in said cause by substituting in lieu thereof a photostatic or certified copy of any such exhibits that are withdrawn.

Dated this 1st day of February, 1935.

Charles H. Carr
Attorney for Plaintiff

Otto Christensen
Attorney for Defendant

[Endorsed]: Filed Feb 7-1935 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

[Title of Court and Cause.]

ORDER

Pursuant to stipulation heretofore entered into between counsel for plaintiff and counsel for defendant, IT IS ORDERED, that the Clerk of this court be, and hereby is, directed to certify to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, all such original exhibits herein which are not incorporated in said Bill of Exceptions as a part thereof.

Dated this 7th day of February, 1935.

Paul J. McCormick
District Judge

[Endorsed]: Filed Feb 7th 1935 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between the above named plaintiff, acting through its counsel of record, and defendant JAMES S. McKNIGHT, acting through his attorney, Mark F. Jones, that the said defendant is hereby given an extension of time in which to file his Bill of Exceptions and Assignment of Errors and/or other documents connected with said appeal in the above entitled cause, to the 17th day of March, 1935.

Dated this 17th day of January, 1935.

Hugh L. Dickson
Attorney for plaintiff.

Mark F. Jones
Attorney for defendant, JAMES S. McKNIGHT.

ORDER

On the above stipulation, IT IS HEREBY ORDERED that the defendant JAMES S. McKNIGHT shall have, and he is hereby given, an extension of time and term until February 10, 1935 in which to file and serve his Bill of Exceptions and assignment of errors in the above cause.

Paul J. McCormick
Judge of the above Court.

[Endorsed]: Filed Jan 18 1935 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	11654-M Crim.
	)	
vs.	)	NOTICE OF
	)	APPEAL
JAMES S. McKNIGHT, et al,	)	
Defendants.	)	

— — — — — — — — — — — — — — — — — — —

JAMES S. McKNIGHT,
5301 West 8th Street,
Los Angeles, California,
Appellant.

MARK F. JONES,
622 C. C. Chapman Building,
Los Angeles, California,
Attorney for Appellant.

Offense: Mailing non-mailable matter and conspiracy to mail non-mailable matter.

Date of Judgment: December 19, 1934.

Brief description of judgment or sentence: Imprisonment in the County Jail of Los Angeles County for 60 days and a fine of $500.00 and commitment until paid on the first count, and a term of 6 months in the Los Angeles County Jail on each of counts 2, 3 and 4, to run concurrently and suspended for 2 years on probation.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Dated December 20, 1934.

James S. McKnight
Appellant.

Grounds of Appeal:

1. That the evidence does not support the verdict.

2. That the Court erred in denying appellant's motion for a directed verdict.

3. That the Court erred in overruling appellant's demurrer.

4. That the Court erred in overruling appellant's plea in abatement.

5. That the Court erred in admitting evidence over the objection of the appellant and in excluding evidence offered by the appellant.

6. That the Court erred in giving certain instructions to the jury and in refusing to give certain instructions to the jury which were requested by appellant.

[Endorsed]: Rec'd copy within notice this 20th day of December, 1934. Peirson M. Hall, D. H. Atty for U. S. A. Filed Dec 20 1934 R. S. Zimmerman, Clerk, By Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now James S. McKnight, in connection with his notice filed with the Clerk of the above entitled court, stating that he appeals to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from the judgments and sentences entered in the above entitled cause against him on December 19th, 1934, and said defendant having duly given notice of appeal as provided by law, now makes and files with the said notice of appeal the following assignment of errors herein, upon which he will apply for a reversal of said judgments and sentences, and each of them, upon appeal, and which errors, and each of them, are to the great detriment, prejudice and injury of said defendant, in violation of the rights conferred upon him by law; and said defendant says that in the record and proceedings in the above entitled cause, upon the hearing and determination thereof, in the Central Division of the United States District Court for the Southern District of California, there is manifest error in this, to-wit:

I.

Said District Court erred in overruling the demurrer interposed to the bill of indictment herein, and the grounds of said demurrer and the grounds of said error in overruling it, were and are as follows:

1. That the said indictment and each count thereof does not state facts sufficient to charge the said defendants, or either of them,

(a) With having committed any crime or offense against the United States of America;

(b) The matters and things alleged in each and every count of said indictment do not constitute an offense against the laws of the United States of America.

2. That the said indictment, and each and every count thereof, in the manner and form as the same are therein set forth and stated, is not sufficient at law to constitute a public offense against the United States, under the provisions of Title 18, Sec. 335, U. S. C., or under the provisions of Title 18, Sec. 88; U. S. C., in that:

The matters therein alleged to have been deposited for mailing or delivery are not upon their face libelous, scurrilous, defamatory and calculated to and obviously intended to reflect injuriously upon the character and conduct of the said Stephen W. Cunningham.

II.

Said District Court erred in denying the motion made at the conclusion of plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count I of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are: That the evidence adduced does not tend to prove that the defendant is guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

III.

Said District Court erred in denying the motion made at the conclusion of plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 2 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are: That the evidence adduced does not tend to prove that the defendant is guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

IV.

Said District Court erred in denying the motion made at the conclusion of plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 3 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are: That the evidence adduced does not tend to prove that the defendant is guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

V.

Said District Court erred in denying the motion made at the conclusion of plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 4 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are: That the evidence adduced does not tend to prove that the defendant is guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

VI.

Said District Court erred in permitting counsel for the plaintiff to cross-examine its witness, Isador Bley Stein, upon the request of the prosecution so to do because "of surprise", in the absence of any showing thereof, or any lawful reason therefor. The witness previous to the prosecution making its request, testified as follows:

"Q. Did you ever at any time discuss it with anyone as to any cards being sent out?

A. Not definitely as to certain cards. I had a conversation with reference to the possibility of postcards going out with Lee Ringer and Mr. McKnight about the 10th of May. We had prepared to send out a newspaper and Mr. McKnight had suggested that we get started on the campaign and we expected to have to add something to the newspaper in the way of handbills and letters or something of that nature. I think he had determined before that what they should be, and a rough draft had been made, and at that time he made a suggestion that perhaps we might be able to use postal cards because they were cheaper. * * * that was the only conversation I had with them directly about postal cards. That conversation I think was the only one I had relative to postal cards."

Thereupon the prosecution inquired as follows:

"Q. Has anyone talked to you about this case in the last couple of days? A. No, sir.

Q. You haven't been talked to by anybody? A. No, sir.

Q. Has Mr. Taylor talked to you? A. No, sir.

Q. He hasn't talked to you about the court room here?

MR. JONES: I object to that as cross examination of his own witness."

Thereupon the District Attorney stated:

"MR. CARR: At this time I am going to ask to be allowed to cross-examine this witness on the ground of suprprise."

Thereupon the following proceedings were had:

"MR. JONES: We object to that at this time for the reason that the witness has shown no hostility whatsoever and has freely, frankly and voluntarily answered the questions, all questions that have been propounded to him. He is a defendant in the law suit and is voluntarily testifying in this case and for that reason I object to the witness being cross examined, a total absence of any reason why he should be permitted to cross examine him.

Q. By the Court: Are you a defendant in any civil suit pending between these other defendants? A. No, sir.

Q. You entered a plea of what we call nolo contendere here in this case?

A. Yes, sir.

Q. And on the date that that plea was entered the United States Attorney, Mr. Carr, was here, was he not?

A. Yes, sir.

Q. And he suggested to the court that the government was willing that the court should receive that plea of nolo contendere, didn't he?

A. Yes, sir.

THE COURT: You may cross examine him, Mr. Carr.

MR. JONES: Exception."

Thereupon counsel proceeded to cross-examine its witness as follows:

"Q. I hand you here government's Exhibit No. 3, certain language there with the letters or the words appearing thereon, 'Alumni Protest League'. What is that League?

A. The League is nothing.

Q. What do you know about that, Mr. Stein?

A. All I know is that is the name of a league, used as a name to put out information against the candidacy of Cunningham."

Q. Do you know where that name came from?

A. Yes, sir, I think this name came from Mr. McKnight's suggestion.

Q. Just give us the date when that suggestion was made?

A. About May 8th or 9th; I think *Ree* Ringer was present.

MR. JONES: I object to that upon the ground that it does not tend to prove or disprove the conspiracy charged in this indictment. * * * The indictment * * * refers to * * * the mailing of a particular postal card and not to the formation or any of its contents. * * * That is not charged in the indictment * * * and * * * any testimony of that kind would be incompetent, irrelevant and immaterial.

THE COURT. The objection is overruled.

MR. JONES: Exception.

Q. Relate the conversation.

A. I had previously arranged with Mr. McKnight on the preparation of a newspaper and Mr. McKnight sug-

gested that we mail something or send out handbills earlier in the campaign, that the newspaper would take considerable time to prepare, and he asked me if I would, if I would see to the sending out of letters telling about the campaign. He knew that I had gone to the university and that I had known Mr. Cunningham at the time he was manager there and the facts that I told him about as to his mismanagement of the affairs and that those facts should be known to all of the voters, and at the time he asked me I told him that my name wouldn't mean anything signed to a letter, just a waste of postage, and at that time he suggested that since Lee Ringer and myself and the girl who was there that I had sent for a job were all graduates of the university perhaps we should form an association and use a name which would become or would be effective in that particular group, and I told him that I would not, that so far as the Alumni Association was concerned they were all for Cunningham and there was no percentage in trying to make up a league of alumni, and at that time he suggested it would only be a protest league, that no one would know he was in it, that he was not publishing any of the members, and we might as well call it an alumni association.

Q. Anything further said as to taking an office location for that organization?

A. Yes, sir, He said that there would have to be some form of dignity to it if it was going to be an organization. He asked me what was my address downtown because he said we could use the address down there, and naturally the building there was at 215 West Seventh Street, the Bartlett Building, and he said, 'So far as the League is concerned can't we use that?' and I told him it was the

number of the building, and so far as I was concerned that they were welcome to it, that they had 400 rooms there, and that it didn't make any difference to me what it was used for.

Q. Was the name used in the campaign?

A. That name was used.

Q. In what way was it used?

A. It was used the way it was used there on this card, apparently was used.

Q. Did you know what was the way it was going to be used?

A. The only way I knew it was used it was used for sending some of these cards, they used that same name for them.

Q. Did you have any conversation with Mr. McKnight at any time later with reference to any postal cards or any post cards that had been mailed or might have been mailed?

A. Yes, I had a couple of conversations after this, that is, after we heard the postal cards went out?

Q. Who was present at that time?

A. That I can't recall because I don't remember exactly the conversation.

Q. Were you present?

A. Yes, sir.

Q. Who else?—

A. I don't recall.

Q. Was Mr. McKnight present?

A. Yes, sir.

Q. Was Mr. Taylor present?

A. I don't think so. I don't believe he was there.

Q. About what was the date of that conversation?

A. It was around the time these cards were—I received one of these cards approximately around May 20th.

Q. All right, now; relate the conversation.

A. I went down to the building where I was located and I had received 50 different calls from different people wanting to know why I was opposed to the university and why I was dragging the university into a political squabble, and Cunningham called up, and two or three people called up telling me what they were going to do and what I had done, and so forth, and I spoke to Mr. McKnight, telling him that apparently something was wrong somewhere because people all thought that I was financing a campaign against the university, that we had had a lot of people in the office there, one man posing as a postal inspector, and I understand people had made threats of what they were going to do with the Grand Jury, and so on, and I told them that so far as I was concerned I was getting out of the campaign, I was through, and I told him that it was a fine mess so far as I was concerned.

Q. Was there any further conversation?

A. I don't think so.

Q. Did Mr. McKnight have anything to say?

A. No, sir; only that he was sorry he had caused me any inconvenience. He said he didn't think any wrong had been done, and so far as he was concerned he didn't feel I had done anything myself in any way to get me in bad with the university.

Q. Was Mr. Taylor at the office at that time, at any place in the office?

A. Well, to be very truthful I don't remember Mr. Taylor around at that time.

Q. Well, now, Mr. Stein, will you look again at Government's Exhibit No. 3, at the subject matter, and state just what portion of that subject matter that you yourself prepared?

A. Well, together with Mr. McKnight and Lee Ringer, the three of us prepared all of the matter that is on there except perhaps some of the phraseology.

Q. Read the part that you prepared, Mr. Stein.

A. It says. 'Many people have been misinformed and believe that Stephen W. Cunningham, candidate for Council, from the Third District, is the Graduate Manager of the University of California at Los Angeles. In view of the fact that he is in truth not a graduage of our university we believe that the erroneous impression should be corrected.' I prepared that information.

Q. What part of it did Mc. McKnight prepare?

A. Part of the discussion that occurred was relative to the idea that the reading matter was not strong enough and the other phase should be inserted.

(Question read.)

A. May I explain, at the time we had prepared the other part, I gave a copy to Lee Ringer and Mr. McKnight—he asked about the bids on the printing and Mr. McKnight suggested to check through the matter again, he said that he didn't think it was strong enough, that it didn't say anything, and at that time suggested we should say something about his management or mismanagement, and at the time that we had the conversation he said that we had better put in something about his not being a good manager of the funds, and he inserted this, 'Since his gross mismanagement of finances there has led to his dismissal'.

Q. Mr. McKnight prepared that there himself?

A. Yes, sir, I think so, that part."

VII.

Said District Court erred to the prejudice of the defendant when upon objection to plaintiff cross-examining its own witness, Isador Bley Stein, the court by its questions placed before the jury the fact that the witness Isador Bley Stein had entered a plea of nolo contendere to the indictment herein. Said questions asked by the court were as follows:

"BY THE COURT: Are you a defendant in any civil suit pending between these other defendants?

A. No, sir.

Q. You entered a plea of what we call nolo contendere here in this case?

A. Yes, sir.

Q. And on the date that the plea was entered the United States Attorney, Mr. Carr, was here, was he not?

A. Yes, sir.

Q. And he suggested to the court that the government was willing that the court should receive that plea of nolo contendere, didn't he?

A. Yes, sir.

THE COURT: You may cross examine him, Mr. Carr.

MR. JONES: Exception."

VIII.

Said District Court erred in refusing to charge the jury as requested in defendant's Instruction No. 49:

"You are instructed that you cannot find the defendant McKnight guilty on a mere suspicion, and evidence of mere relationship between him and other defendants or persons not named in this indictment does not establish that there was a conspiracy. In order to find the defendant McKnight guilty you must find that he intentionally participated in the transaction and that he had an evil motive in having said post cards, identified as Exhibits 2 to 5, inclusive, mailed out, and unless you so find your verdict must be not guilty as to the defendant McKnight."

The failure to give said instruction upon the conclusion of the instructions to the jury was duly excepted to.

IX.

Said District Court erred in refusing to charge the jury as requested in defendant's Instruction No. 40:

"The jury is instructed that the presumption of innocence is not a mere *from* to be disregarded by the jury at pleasure, but it is an essential substantial part of the law of the land and binding on the jury in this case as in all criminal cases and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant unless evidence in the case convinces the jury of his guilt as charged beyond all reasonable doubt."

The failure to give said instruction upon the conclusion of the instructions to the jury was duly excepted to.

X.

Said District Court erred in refusing to charge the jury as requested in defendant's Instruction No. 21:

"The presumption of innocence goes with the defendant throughout the whole trial, even till the verdict is rendered, and this presumption of innocence outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt."

The failure to give said instruction upon the conclusion of the instructions to the jury was duly excepted to.

XI.

Said District Court erred in refusing to charge the jury as requested in defendant's Instruction No. 50:

"You are instructed before you can find the defendant McKnight guilty of Count One in the indictment that you must be satisfied from all of the evidence beyond a reasonable doubt that the defendant had actual knowledge and acquiesced and approved on the act of mailing said post cards, being Exhibits 2 to 5, inclusive, out, and that you cannot find him guilty unless the evidence convinces you beyond a reasonable doubt that there was an agreement to mail said Exhibits 2 to 5 out, and put the printed matter contained upon the post card upon the same. If the evidence does not satisfy you beyond a reasonable doubt that the defendant McKnight agreed with the other defendants named in the indictment or with *orders,* that said printed matter now contained in said Exhibits 2 to 5 should be printed upon a post card on said exhibits and mailed out, then the defendant McKnight would not be guilty and you are further instructed that the defendant

McKnight is not responsible for the conduct of other parties, if any there shall be found by you who mailed said post cards out, unless the evidence convinces you beyond a reasonable doubt that he did have knowledge and approve and acquiesce in the mailing out of said post cards."

The failure to give said instruction upon the conclusion of instructions to the jury was duly excepted to.

XI.

Said District Court erred in refusing to charge the jury as requested in defendant's Instruction No. 30:

"A reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. It is not sufficient to establish a probability, even though a strong one; arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must go further and establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of the jurors, who are bound to act upon it conscientiously."

The failure to give said instruction upon the conclusion of instructions to the jury was duly excepted to.

XII.

Said District Court erred in refusing to charge the jury as requested in defendant's Instruction No. 22:

"You are instructed that the presumption of innocence with which the defendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption, and to acquit this defendant unless the evidence in the case convinced you of his guilt as charged beyond all reasonable doubt."

The failure to give said instruction upon the conclusion of instructions to the jury was duly excepted to.

CONCLUSION

WHEREFORE, the said James S. McKnight, by reason of the errors aforesaid, prays that the said judgments and sentences against and upon him, the said James S. McKnight, may be reversed and held for naught.

James S. McKnight
Defendant

Otto Christensen
Counsel for said James S. McKnight

[Endorsed]: Filed Feb 8-1935 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BOND PENDING DECISION ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, JAMES S. McKNIGHT, as principal, of the City of Los Angeles, State of California, and Velma R. McKnight and Bessie Louise Hewitt as sureties, all of the City of Los Angeles, California, are jointly and severally held and firmly bound unto the United States of America in the sum of Five Thousand Dollars ($5000) for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

Signed and sealed and dated this 20th day of December, 1934.

WHEREAS, on the 19th day of December, 1934, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court, between the United States of America, plaintiff, and James S. McKnight, et al, Defendants, a judgment and sentence was made, given and rendered and entered against the said James S. McKnight in the above entitled action, wherein he was convicted of a violation of Section 212, Federal Penal Code, and Section 37, Federal Code—Conspiracy to violate Section 212 of the Federal Penal Code, and

WHEREAS, judgment was rendered against the said defendant in said action and he was by said judgment sentenced to be imprisoned in the Los Angeles County Jail, Los Angeles, California, for a period of 60 days and to pay a fine unto the United States of America in the sum

of $500.00, and stand committed until said fine shall have been paid, on the first count and was sentenced to be imprisoned in the Los Angeles County jail, Los Angeles, California, for a period of 6 months on each of counts 2, 3 and 4 of the indictment, to run concurrently, and suspended for two years on probation, and

The said James S. McKnight having filed a Notice of Appeal wherein and whereby he has appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, and,

WHEREAS, the said James S. McKnight has been admitted to bail pending the decision upon said appeal in the sum of $5000.00,

NOW THEREFORE, the conditions of the above obligation are such that if the said James S. McKnight shall appear, either in person or by his attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in the said court and prosecute his appeal, and if the said James S. McKnight shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause; and if the said James S. McKnight shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals, Ninth Circuit; and if the said James S. McKnight shall appear for trial in the District Court of the United States, in and for the Southern District of

California, Central Division, on such day or days as may be appointed for the retrial of the said District Court, and abide by and obey all orders made by the said District Court, if the said judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit.

Then this obligation to be void, otherwise to remain in full force, virtue and effect.

James S. McKnight
Principal.
5301 W. 8th St. L. A.

Velma R. McKnight
Bessie Louise Hewitt
Sureties.

UNITED STATES OF AMERICA,

Southern District of California,)
County of Los Angeles) ss.

Velma R. McKnight and Bessie Louise Hewitt

BEING DULY SWORN, EACH FOR HERELF DEPOSES AND SAYS: That she is a freeholder in said District, and is worth the sum of Five Thousand Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities and own the property listed below, and owns property listed below of the value set out.

Subscribed and sworn to before me this 20th day of December, 1934.

[Seal] Bessie Louise Hewitt
Velma R. McKnight

David B. Head
U. S. Commissioner

McKnight

Lot 13—Tract 3821 Bk. 42 p. 15—L. A. County value $15,000 clear of encumbrances 3301 W. 8 St. L. A.

Hewitt

Lot 158 Tract 7615 Maps 85—15—17—value $15,000 encumbrances $5,000 109 N. La Peer Drive L. A.

I hereby certify that I have personally examined the sureties on the within bond and find them good and sufficient

[Seal] David B. Head
U. S. Commissioner

Bond approved this 20th day of December 1934

Paul J McCormick
Judge.

[Endorsed]: Filed Dec. 20, 1934 R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE

For Transcript of Record

TO THE CLERK OF SAID COURT:

Please issue a transcript of the record to the United States Circuit Court of Appeals, Ninth Circuit, in the above entitled cause, and include the following:

1. Indictment
2. Statement of docket entries.
3. Demurrer of Defendant McKnight and ruling thereon.
4. Plea of Defendant McKnight.
5. Verdict of the Jury.
6. Judgment and sentence of the court.
7. Bill of Exceptions.
8. Stipulation and Order regarding certifying exhibits.
9. Stipulation and Order extending time for bill of Exceptions and Assignment of Errors.
10. Notice of Appeal.
11. Assignment of Errors.
12. Bond on Appeal.
13. Praecipe for Transcript of Record on Appeal.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals, Ninth Circuit, and to be filed in the office of the U. S. Circuit Court of Appeals, Ninth Circuit, as required by law.

Dated this 7th day of February, 1935.

Otto Christensen

Attorney for defendant and Appellant
James S. McKnight

[Endorsed]: Filed Feb 8-1935 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 137 pages, numbered from 1 to 137 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the statement of docket entries; indictment; demurrer; order overruling demurrer, and plea of not guilty of defendant McKnight; minute order of December 19, 1934, containing verdict, judgment and sentence; bill of exceptions; stipulation re exhibits; order re exhibits; stipulation and order extending time to file bill of exceptions; notice of appeal; assignment of errors; bond on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7721

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES S. McKNIGHT,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF AND ARGUMENT FOR APPELLANT

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IN THE

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES S. McKNIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF AND ARGUMENT FOR APPELLANT

Statement of the Case

James S. McKnight, together with Bley Stein and Robert E. Taylor, were indicted, charged with violation of Sections 88 and 335, Title 18, *United States Code.* The indictment was returned by the Grand Jury on, to-wit, the 6th day of September, 1933, and contained five counts. The first count of said indictment charged that the appellant James S. McKnight, together with the other defendants aforesaid, one Lee Ringer, and other persons unknown to the grand jury, entered into a conspiracy to commit an offense against the United States, the offense being "to deposit and cause to be deposited in the United States mails for transmission thereby to other persons postal cards and post cards upon which is delineated, written or printed epithets, terms and language that is libelous, scurrilous and defamatory and that is calculated by the terms and manner and style of display and obviously intended to reflect injuriously upon the character and conduct of another, to-wit, one Stephen W. Cun-

ningham, in violation of Section 335, Title 18, *United States Code.*"

This count of the indictment further charged nine overt acts, but for the purposes of this appeal we are concerned only with overt acts No. 5 and No. 8, for these alone set forth the postal cards. Overt act No. 5 alleges that on May 22nd, 1933, the defendants mailed and caused to be mailed a number of postal cards, on each of which was printed the following language:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed . . . and believe that Stephen W. Cunningham, candidate for counsel from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

"In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mismanagement of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE
University of California at Los Angeles
215 West 7th Street."

The eighth overt act alleges that on the 15th day of May, 1933, the defendants had cards printed for mailing which contained the following subject matter:

"DEFEAT CUNNINGHAM FOR COUNCIL

His only qualification as candidate appears to be his association with the University of California at Los Angeles. Inasmuch as that

WE PROTEST association has not been a happy one, we are appealing to you to defeat this man who depleted our student body finances, and now seeks public office! U.C.L.A.
MISMANAGER CUNNINGHAM

HERE ARE THE FACTS:

7,000 U. C. L. A. STUDENTS
$126,000 DEFICIT

Cunningham was dismissed as manager of student affairs when the student body found itself without funds . . . and facing a deficit of $126,000.00.

IT TOOK 9 YEARS
TO DO IT
GOD HELP THE
TAXPAYERS IF
HE'S ELECTED
COUNCILMAN

We object to his attempt and that of his political backers to capitalize upon the dignity and good name of U. C. L. A.

ALUMNI PROTEST
LEAGUE
University of California at Los Angeles."

It will be noted that overt act No. 8 only alleges the printing of this card for mailing, whereas overt act No. 5 alleges that a number of the cards there set forth were actually mailed.

The second count of said indictment charged that the appellant and the other defendants did on or about the 22nd day of May, at Los Angeles, knowingly, wilfully, unlawfully and feloniously deposit or cause to be deposited for mailing and delivery in the Post Office establishment of the United States, a postal card with the proper postage thereon prepaid, addressed to a certain person named therein; the indictment then proceeds

to charge that said postal card "had delineated, written and printed thereon epithets, terms and language that was libelous, scurrilous and defamatory of and concerning one Stephen W. Cunningham, and which was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, and which was intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham." This count then sets forth the identical card alleged as overt act No. 5 of count 1.

The third, fourth and fifth counts of said indictment were identical in form and substance as the second count thereof, save that a different name and address is set forth respectively in each of said counts; the card alleged to have been mailed in each instance being the same card as set forth as overt act 5 in Count 1 (R. 10-15).

A demurrer was filed in behalf of the appellant, challenging the sufficiency of each count of the indictment, which, after argument, was overruled and an exception noted (R. 16, 26). The only ground of the demurrer that is involved in this appeal is the one challenging the sufficiency of each count of said indictment, to charge a public offense against the United States, in that: The matters alleged to have been deposited for mailing and delivery or printed for mailing are not upon their face libelous, scurrilous, defamatory and calculated to and obviously intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham.

A jury was selected, impaneled and sworn to try the appellant James S. McKnight and Robert E. Taylor on

the 19th day of December, 1934, and thereafter, on said 19th day of December, 1934, returned a verdict of guilty against the appellant James S. McKnight on Counts 1, 2, 3, and 4 of the indictment, and a verdict of not guilty as to the defendant Robert E. Taylor on all counts of the indictment (R. 26, 29).

Upon these verdicts the District Court on said 19th day of December, 1934, rendered judgment, sentencing the appellant James S. McKnight to be imprisoned for a period of sixty days in the Los Angeles County Jail, and to pay a fine of $500, on the first count of said indictment; and upon each of the second, third and fourth counts, to be imprisoned for a period of six months in said County Jail, said terms of imprisonment imposed on the second, third and fourth counts to begin and run concurrently, and not consecutively, and to be suspended for a period of two years on the condition that the defendant refrain from the violation of any laws of the United States (R. 30).

The evidence revealed the following material matters: That the appellant James S. McKnight was a member of the Common Council of the City of Los Angeles in May, 1933, and was a candidate for reelection; that his opponent in that political campaign was Stephen W. Cunningham (R. 60); that one Isadore Bley Stein (named as a defendant but not on trial) testified as a witness for the Government. He testified that he worked in the campaign headquarters of the appellant James S. McKnight for approximately fourteen days in May, 1933 (R. 43); that previous to his doing work at the campaign headquarters he had not known Mr. McKnight; that he

became acquainted with him on an occasion in May of 1933, when he introduced himself and "explained the fact that Cunningham had been dismissed as Manager of the University and * * * that if people knew that I didn't think he would get many votes" (R. 56); that he had arranged with Mr. McKnight "on the preparation of a newspaper" and that he told Mr. McKnight concerning Cunningham's "mismanagement of the affairs" at the University and "that those facts should be known to all of the voters" (R. 48); that he furnished "the information to Mr. McKnight and what he proposed to put out in the newspapers" (R. 44); that a draft of the text appearing in the post card set forth as overt act No. 5 of the conspiracy count and in the substantive counts of the indictment was prepared by him, with the exception of the phrase appearing therein "mismanagement of finances", which was suggested by Mr. McKnight in a conference on campaign literature (R. 51), when Mr. McKnight said: "It doesn't seem to say much. We had better say something about his not being a good manager", "and I told him that was all right." "That in that conversation he told Mr. McKnight that Mr. Cunningham was not a good manager, that he had mismanaged the finances up there at the university and that he had been dismissed from that position; * * * that he told Mr. McKnight that Cunningham had grossly mismanaged the finances there and that he could prove it" (R. 55); that he did not know when or how the sheet of paper which he submitted as a draft of campaign material (later appearing on Government's Exhibit 3, also 12 and 4, and being the same as the text of the card set

forth in each of the substantive counts of the indictment) was going to be used; that nothing was said concerning how the information contained (on that piece of paper) was to be disseminated to the public (R. 55).

Th evidence did not disclose that the appellant McKnight was directly responsible for the dissemination of this information by means of the mailing of the postal cards to the electorate. The evidence does disclose that there were a large number of persons employed or working at the McKnight campaign headquarters (R. 43). The evidence does disclose, however, that some one at his political headquarters had employed certain persons to address blank postal cards, among whom was one Angelina Hart, who identified the address on plaintiff's Exhibit No. 3 as being in the handwriting of her sister, who aided her in addressing the blank postal cards; that at the time of the addressing of these postal cards there was no printing on the reverse side thereof (R. 38); that someone at campaign headquarters where she had applied for work had given her the blank cards to address (R. 41).

Aside from the postal cards (which were all identical) set forth in the substantive counts of the indictment, as well as set forth as overt act No. 5 in the conspiracy count (Count 1), and received in evidence as plaintiff's Exhibits 1, 2, 3 and 4, which were respectively identified by the addressees as having been received through the United States mails, the only other card offered and received in evidence was in connection with the conspiracy count, namely, the card set forth in overt act No. 8.

In fact the record contains no evidence whatsoever that any other card was contemplated to be used in the campaign disseminating information concerning Mr. Cunningham's University activities other than the two set forth in the overt acts above enumerated. As to the latter card set forth as overt act No. 8, there is no evidence of any ever having been mailed. The evidence reflects that a permit was issued by the Post Office Department at Los Angeles to one Angelina Hart (R 35) and that a printer printed the text appearing in overt act No. 8 on post cards containing the permit number of the permit issued to Angelina Hart (R. 67).

Plaintiff's Exhibit No. 13 is a cardboard folder containing four of the cards set forth as overt act No. 8 of the conspiracy count (R. 68). The evidence shows that the cards containing the text appearing on the card set forth as overt act No. 8 were destroyed by and upon the initiative of Bley Stein (R. 86).

Motions for a directed verdict were interposed by appellant at the conclusion of the plaintiff's case, denied and exceptions allowed (R. 88); appellant renewed his motions for a directed verdict at the conclusion of all of the testimony, which motions were denied and exceptions noted (R. 89).

We have not undertaken a complete statement of all of the evidence, as much of it is immaterial to a consideration of the errors arising from the court's failure to grant the appellant's motions for a directed verdict, and this because the ultimate question in considering the alleged error in failing to direct a verdict for the appellant is limited to the text of the two cards set forth in

overt acts No. 5 and No. 8 of the conspiracy count of the indictment, as these were the only cards either mailed or contemplated to be mailed respecting which the government offered any evidence. In fact if it were not for the general character of the charge in the conspiracy count that it was the purpose of the defendants to mail or cause to be mailed "postal cards and post cards", the whole matter could be determined on the Court's ruling on this demurrer.

Of course this can be done in the instance of the substantive counts.

Error is also assigned to the action of the court in developing the fact that the witness Isador Bley Stein entered a plea of nolo contendere to the indictment.

The court in its instructions to the jury failed to give any instruction whatsoever on the presumption of innocence. The appellant had submitted certain approved forms of instructions on the principle of the presumption of innocence and requested the court to give the same; to the court's failure to instruct the jury upon the presumption of innocence, the appellant duly took an exception (R. 106, 109). The court's instructions in full are set forth in the Bill of Exceptions at pages 89 to 105.

Specifications of Error Upon Which Appellant Will Rely

I.

The District Court erred in refusing to charge the jury as requested in Appellant's Instruction No. 21:

> "The presumption of innocence goes with the defendant throughout the whole trial, even till the

verdict is rendered, and this presumption of innocence outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt.' ' (A. E. 10, R. 129-130; Bill of Exceptions, R. 106.)

II.

The District Court erred in refusing to charge the jury as requested in appellant's Instruction No. 22:

"You are instructed that the presumption of innocence with which the defendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption, and to acquit this defendant unless the evidence in the case convinces you of his guilt as charged beyond all reasonable doubt." (A. E. 12, R. 129; Bill of Exceptions 109.)

III.

The District Court erred to the prejudice of the appellant when upon objection to plaintiff cross-examining its own witness, Isador Bley Stein, the court by its questions placed before the jury the fact that the witness Isador Bley Stein had entered a plea of nolo contendere to the indictment herein. Said questions asked by the court were as follows:

"By the Court: Are you a defendant in any civil suit pending between these other defendants?

A. No, sir.

Q. You entered a plea of what we call nolo contendere here in this case?

A. Yes, sir.

Q. And on the date that the plea was entered the United States Attorney, Mr. Carr, was here, was he not?

A. Yes, sir.

Q. And he suggested to the court that the government was willing that the court should receive that plea of nolo contendere, didn't he?

A. Yes, sir.

The Court: You may cross examine him, Mr. Carr.

Mr. Jones: Exceptions." (A. S. 7, R. 128; Bill of Exceptions, R. 46-47.)

IV.

The District Court erred in denying the motions made at the conclusion of the plaintiff's case, and renewed at the close of all of the evidence introduced in said case, to direct verdicts of not guilty upon each of the counts of the indictment. The grounds of said motion were, and the grounds of said error in denying said motion, were and are that the evidence adduced does not tend to prove that the appellant is guilty in manner and form as charged in any of the counts of said indictment, and is insufficient to support a verdict of guilty on any of said counts (A. E. 2, 3, 4 and 5, R. 119-120; Bill of Exceptions, R. 88, 89).

The appellant relies upon each assignment of error separately made to each count of the indictment respecting the question of the insufficiency of the evidence.

These assignments are not here repeated as they are similar in text.

V.

The District Court erred in overruling the demurrer interposed to the bill of indictment herein, and the grounds of said demurrer and the grounds of said error in overruling it, were and are as follows:

1. That the said indictment and each count thereof does not state facts sufficient to charge the said defendants, or either of them,

(a) With having committed any crime or offense against the United States of America;

(b) The matters and things alleged in each and every count of said indictment do not constitute an offense against the laws of the United States of America.

2. That the said indictment, and each and every count thereof, in the manner and form as the same are therein set forth and stated, is not sufficient at law to constitute a public offense against the United States, under the provisions of Title 18, Sec. 335, *U. S. C.*, or under the provisions of Title 18, Sec. 88, *U. S. C.*, in that:

The matters therein alleged to have been deposited for mailing or delivery are not upon their face libelous, scurrilous, defamatory, and calculated to and obviously intended to reflect injuriously upon the character and conduct of the said Stephen W. Cunningham. (A. E. 1, R. 118-119; R. 26.)

BRIEF OF ARGUMENT

I.

The Court Should Have Instructed on the Presumption of Innocence

The trial court, although instructing the jury on the doctrine of reasonable doubt (R. 104), failed to instruct the jury upon the principle of the presumption of innocence. The appellant, in his requested instructions Nos. 21 and 22, submitted proper statements of the law regarding the principle of the presumption of innocence (R. 106, 109). Although the court properly instructed on the doctrine of reasonable doubt, nevertheless the judgment and sentence of the court below must be reversed because of its failure to instruct on the presumption of innocence. The presumption of innocence is in the nature of evidence in favor of the accused introduced by the law in his behalf, whereas "reasonable doubt" is the condition of mind produced by the proof resulting from the evidence in the case. It is a result of the proof, not the proof itself.

The general principles involved are academic and the precise question has been determined by the United States Supreme Court in the following cases:

U. S. vs. Coffin, 39 L. Ed. 481, 492; 156 U. S. 432, 460;

U. S. vs. Cochrane, 39 L. Ed. 704, 708; 157 U. S. 286, 298.

II.

It Was Improper for the Court to Develop the Fact That One of the Defendants, Not on Trial, Had Entered a Plea of Nolo Contendere.

During the course of the examination of the Government's witness, Isador Bley Stein, a defendant named in the indictment, the court conducted an examination of this witness, in which he developed the fact that by permission of the court and on the request of the United States Attorney for such permission, the witness had entered a plea of nolo contendere to the indictment.

The plea of nolo contendere is, in effect, a plea of guilty.

> *U. S. vs. Hudson,* 272 U. S. 451, 455; 71 L. Ed. 347, 349.

It is fundamental that declarations even of alleged coconspirators are only admissible against a defendant when a conspiracy has first been proven, and the defendant against whom the declarations are offered, has been proven to be a member of the conspiracy. The alleged conspiracy here, under the state of the evidence, had ended some time prior to the return of the indictment. It is too academic a question to warrant a discussion that the act of Stein in pleading nolo contendere (guilty), was not an act in furtherance of the conspiracy and also inadmissible in evidence against the defendants on trial. The trial court did precisely what was done and condemned in the case of *State v. Justesen,* 35 Utah 105, 99 Pac. 456. In that case the record of the plea of guilty of perjury by the person alleged to

have been procured to commit the perjury was received in evidence, and in this case the same result was obtained by the processes of the court's own examination of the defendant Stein, not on trial. The admission in evidence of this record in the case of *State v. Justesen*, supra, was held to be error and the judgment of the lower court reversed, the court saying:

> "The record of Larson's plea of guilty to the information charging him with perjury, and the statement of the District Attorney with reference thereto, were especially prejudicial and the objections made to them should have been sustained. The rule is elementary that where two or more persons have joined to conspire together to commit a crime and have either accomplished or abandoned their common design, no one of them can by the subsequent act or declaration of his own affect his co-conspirators. 'His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence as such against any but himself.' 1 Greenl. Ev. 233. See also, Wharton, Crim. Ev. 639; People vs. Farrell, 11 Utah 419, 40 Pac. 703; 6 A. & E. Enc. Law (2d Ed.) 571, 572."

See also:

U. S. vs. Richards, 149 Fed. 443, 452;

John Brown v. U. S., 150 U. S. 93, 99, 37 L. Ed. 1010, 1013;

Graham v. U. S., 15 Fed. (2d) 740 (CCA 8).

III.

The Two Postal Cards in Question Do Not Violate Section 335, Title 18, United States Code

We come now to a consideration of what is really the primary question in this appeal. While we have discussed two errors occurring upon the trial, one of which relates to the failure of the court to give an instruction upon the presumption of innocence and for which the judgment and sentence of the lower court alone must be reversed, we desire nevertheless to discuss the question now under consideration, because if our contentions are sustained by this court, then it will lead to a reversal of the cause without being remanded for a new trial.

The questions here are raised in two ways: First, by a demurrer to the indictment, and secondly, by motions for a directed verdict. Technically the question is raised properly only by a motion for a directed verdict as to the conspiracy count, because of the general character of the charge that it was the purpose of the defendants to mail postal cards of a character denounced by Section 335, Title 18, *U. S. Code*. If the conspiracy charge had affirmatively pleaded that the purpose of the conspiracy was to mail the two cards in question, then the whole matter could have been raised by demurrer and a bill of exceptions would have been unnecessary. The primary purpose of the bill of exceptions was to limit the charge of the conspiracy in the indictment by showing that the only cards that it was the object of the conspiracy to mail was limited to these two cards. Conversely stated, the bill of exceptions excludes any other cards as being the object of the conspiracy. We are,

therefore, concerned only with the text of these two cards.

The indictment in this case is obviously one of first impression with the prosecutor for the books contain no cases whatsoever wherein a postal card was mailed or contemplated to be mailed that was anywhere near similar in text or subject matter. The question is new and presents an important matter for the determination of this court.

If the cards in question had been enclosed in an envelope it would be no offense against any law of the United States.

Embraced in the general purpose of the statute was the stopping of exposure of obscene, scurrilous and libelous material to the eye of those engaged in the postal service, such as obscene and indecent pictures and caricatures, obscene and lewd reading matter, dunning collection agency cards, and libelous and scurrilous matter obviously calculated to injuriously reflect upon the character of another. Its aim was the protection of private citizens against open exposure of such material to the gaze of the employees of the postal establishment and persons who might view the material before it was actually received by the addressee; and perhaps, also, to safeguard the morals of postal employees and persons likely to view the material before delivery. It was not designed to throttle freedom of speech or deny the use of the mails either to the press or political aspirants in the dissemination of information and news to the public at large.

The question here involved affects not only the right of the use of the mails by political candidates, but of every newspaper in the country, for the statute aims not only at the open postal card, but anything which constitutes an envelope, cover or wrapper. Every newspaper and magazine in the country come within the statute, because newspapers and magazines without any special wrapper or cover make the front and rear pages thereof the cover for the purpose of transmission and these pages are exposed to public gaze.

Even during the pendency of war, however much it may have been abridged, the right of free speech was not wholly suspended. Even the Espionage Act did not assume to and could scarcely repeal the First Amendment to the United States Constitution. The right of a citizen to discuss the affairs of his government is fundamental to any conception of a democracy. With this is the corollary right of the discussion of and dissemination of information concerning political candidates who, if successful, become the ministers of government. Section 335 was not intended to limit this right. To hold that the subject matter and text of the cards in question comes within Section 335, is to assume something which scarcely can be assumed, namely, that it has repealed the First Amendment to the United States Constitution.

We contend that the text and subject matter of the postal cards are not per se "indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or of threatening character, or calculated * * * to reflect injuriously upon the character * * * of another." To constitute an offense within Section 335, Title 18, *U. S. C.*, the

language complained of must be per se upon its face within the denunciation of the statute.

U. S. vs. Davidson, 244 Fed. 523, 525 and 526;
U. S. vs. Jarvis, 59 Fed. 357;
U. S. vs. Davis, 38 Fed. 326;
In re Barber, 75 Fed. 980;
U. S. vs. Lamkin, 73 Fed. 459.

This is particularly true because this statute does not make the publication an offense. The offense consists in using the United States mails for its circulation.

U. S. vs. Robout, 28 Fed. 523.

This view is also supported by the fact that if the card had been enclosed in a wrapper or envelope no criminal offense would have been committed. The court, in *U. S. vs. Nathan,* 61 Fed. 936, held that a libelous, defamatory or threatening letter, if enclosed in a wrapper, envelope or other covering would not fall within the inhibitions of the statute.

The statute alone creates and defines the offense, and the government cannot by suggestion, innuendo, averment or charge, add to its provisions, nor can it widen the statute's application by adding to the letter or writing something not contained therein. A violation of the statute cannot be based upon any hidden intent.

U. S. v. Davidson, supra;
Krause v. U. S., 28 Fed. (2) 248;
U. S. v. Grimm, 45 Fed. 558.

In the indictment the pleader uses the conjunction "and" rather than the disjunctive "or", as used in the

statute before the words "calculated * * * to reflect injuriously upon the character, etc." In other words, the word "or" is "and", and undoubtedly it was for that reason that the pleader drew the indictment in the conjunctive. A publication is not within the provisions of Section 335, Title 18, *U. S. C.,* unless the language thereof per se is libelous, scurrilous, defamatory *and* calculated and obviously intended to reflect injuriously, etc.

The test, therefore, in this case is whether or not the language of the publication was per se libelous, scurrilous, defamatory *and* calculated to reflect injuriously upon the character, etc., of another.

> *Swearingen v. U. S.*, 161 U. S. 448, 40 L. Ed. 765; *U. S. v. Moore,* 104 Fed. 78.

In *U. S. vs. Davidson,* supra, the indictment contains two counts, one for a violation of Section 211 of the *Criminal Code,* and the other for a violation of Section 212 (Sec. 335, Title 18, *U. S. C.*). The second count is based upon the abbreviation of the word "Prostitute", "Pros.", appearing on the face of the envelope following the name of the woman to whom the same was addressed. The court held that the language used must be construed—

> "as generally understood and according to their ordinary and natural and well-defined meanings."

The court also said:

> "It would seem that a statute of this character. to prevent the abuse or improper use of the United

> States post office establishment and mails, is intended for the protection of the government and general public, and not the redress of private grievances."

In the case of *U. S. v. Jarvis*, supra, the envelope contained the name of the addressee and the address as follows:

> "Room 32, Pease House, Front St., City. The Notorious";

and it was held that this was not defamatory per se and calculated to reflect injuriously upon the addressee. The court said:

> "The epithet, although presumably offensive to the person addressed, is not per se indecent, scurrilous or defamatory."

Apropos of politics the court in the case of *U. S. vs. Davis*, supra, said:

> "If the subject matter of this writing were political, having in view the almost unrestrained license in the use of defamatory epithets in political writing of almost every kind, except the very highest grade, and the fact that such epithets which in the beginning are intended to denote ignominy and turpitude, *become in the progress of political conflict, by a process of development, badges of honor and are cheerfully accepted as such.*"

The very substantial victory recorded by Mr. Cunningham (which fact may be judicially noticed) over Mr. McKnight eloquently attests the above pronouncement.

In re Barber, supra, an indictment predicated on this statute charged the sending through the mails, envelopes unsealed, containing dunning letters,

> "on the outside of which envelope was printed in 10 point or long primer French Clarendon type, in the English language, the following libelous, scurrilous and defamatory words and language, to-wit, 'Mercantile Protection and Collection Bureau,' in display letters, calculated by the size of the type, terms, manner and style of display, and obviously intended, to reflect injuriously upon the character and conduct of the person to whom said envelopes and dunning letters were directed and addressed."

The court held that the offense charged was not one that came within the statute.

Concerning the object of the statute in question, the court said that it was—

> "to protect the recipient through the mails from indecent and injurious communications which otherwise come under the cover of an envelope or wrapper * * * by attracting the notice of other persons, and raising injurious inferences."

In the case of *Dysart v. U. S.*, 272 U. S. 635, 71 L. Ed. 461, the United States Supreme Court reversed the Circuit Court of Appeals in its affirmation of the judgment of conviction. The case was laid under the analogous statute making it an offense to send through the mails any obscene, lewd, and lascivious publication. The indictment charged the defendant with having sent cards and letters of such character through the mails. These cards and letters were intended to advertise a private

home for unmarried women during pregnancy and confinement, who preferred to be away from home during such time in order "to preserve individual character or family reputation." This case contains some of the latest expressions of the Supreme Court of the United States on the subject under consideration.

In the case of *Sales v. U. S.*, 258 Fed. 597, in a prosecution under Section 334, Title 18, *U. S. C.*, the court said, in reversing the judgment and sentence:

> "It is not enough that a letter or publication be offensive to the feelings or the pride of those into whose hands it may come. Considerations of cast or social position do not enter into the law. *The evil character of the letter or publication declared non-mailable by the clause of the statute under consideration, must be reasonably apparent or discernible on its face.* We know of no case under this clause of the statute in which it has been held that, if the letter or publication in itself is not objectionable, an undisclosed motive or intent of the writer may be found to convict him."

In the case of *Warren vs. U. S.*, 183 Fed. 719, 721 (CCA 4), the court had before it for consideration an indictment charging a violation of Section 335. The envelope described in the indictment had printed in large red characters on its face the following:

> "$1000 reward will be paid to any person who kidnaps Ex. Gov. Taylor and returns him to Kentucky authorities."

Of this language the court said:

> "Aside from the question whether the language employed by the accused is scurrilous, defamatory or threatening, *it* was clearly calculated and obviously intended to reflect injuriously upon the character and conduct of the person named. * * * It was an offer of reward in prominent characters for the kidnaping and return of Mr. Taylor to Kentucky authorities * * * and according to it the accused plainly asserted that Mr. Taylor was charged with crime and was a fugitive from the justice of the State of Kentucky. It needs no discussion to show that such a charge is calculated to reflect injuriously upon one's character and conduct."

The court, in this case, in speaking of Section 335, said:

> "* * * The statute covers mail matter from creditors and collection agencies addressed to debtors and bearing externally visible charges or imputations of habitual refusal to pay just debts, threats of suits, etc., not alone because of a threatening character, *but because calculated and obviously intended to reflect injuriously upon the character and conduct of others.*"

The court, in the case of *U. S. vs. Davis,* supra, states:

> "That which shocks the ordinary and common sense of men as an 'indecency' is the test, as it is also with the other descriptive terms of the act."

And:

> *"The courts must reasonably construe the words of the act, and not allow a hypercritical judgment to take advantage of the elasticity of the language used by the Congress."*

In *Ex parte Doran,* 32 F. 76, 78, the court said (in a prosecution under Section 334):

> "It is not the province of courts to extend the statutes so as to embrace cases not *plainly* and *clearly* within their terms; and, if there is a fair doubt whether the act charged is within the purview of the law, the person who committed it is entitled to the benefit of the doubt."

Only clear and palpable infraction of the statute should be noticed.

U. S. v. Journal Co., 197 Fed. 415.

Under Section 335, the matter must be libelous, scurrilous, defamatory and calculated to and obviously intended to reflect injuriously upon the character and conduct of Mr. Cunningham. All of the elements must be present or no crime is charged. As we have pointed out above, the word "or" is "and"; and obviously for this reason the prosecution drew the complaint in the conjunctive. To be defamatory, the words must charge or impute to a person a crime, fraud, dishonesty, immorality, vice or dishonorable conduct, or must hold him up to

contempt, hatred or ridicule. In short, the words must impute moral delinquency or disreputable conduct.

Houston Printing Co. v. M. Moundon, 41 S. W. 381, at 386; 15 Tex. Civ. App. 574;
Gideon v. Dwyer, 33 N. Y. Supp. 754, 756;
Gallagher v. Bryant, 60 N. Y. Supp. 844.

Libel is a malicious defamation of a person which exposes him to public hatred, contempt or ridicule. It must impute to a person dishonesty, dishonorable or immoral or degrading conduct.

4 *Blackstone Commentaries,* 150;
Shanks v. Stemps, 51 N. Y. Supp. 154, 157;
Root v. King, 7 Cow. (N.Y.) 613, 620;
Moore v. Francis, 3 N. Y. Supp. 162, 50 Hunter 604;
Miller v. Donovan, 39 N. Y. Supp. 820;
Goldberg v. Philadelphia, 42 Fed. 42, 43.

To accuse one of any deficiency in some quality which does not require him, as a good citizen to possess, is not libelous per se. Defamatory words to be libelous per se must be such that the court can perceive, as a matter of law, that they will tend to disgrace the party complaining, or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided.

Baxter vs. Domington, 13 Ariz. 140, 108 Pac. 859, 25 Cyc. 253.

Some concrete illustrations on this general subject may not be amiss. We therefore call attention to a few.

In the case of *Coldwater vs. Jewish Press,* 142 N. Y.

Supp. 188, it was held that an article was not libelous which stated that the plaintiff's wife, the mother of seven children, had committed suicide by jumping out of a window; that the woman was nervous and weak because of taking care alone of the house and seven children; that for the past three years she had been weak and fearfully nervous; and that she had constantly complained that she could not take care alone of the house, the children, an old mother and the plaintiff.

In the case of *Hatfield vs. Sissam*, 59 N. Y. Supp. 73, it was held that a statement to the effect that the plaintiff was criminally liable for his handling of the business and books of the American Athlete was not slanderous per se.

In the case of *Illinois Central Ry. vs. Ely*, 83 Miss. 519, 35 So. 873, it was held that a statement by an employer of an employee who had quit, "cause for leaving, unsatisfactory service," was not libelous per se.

The other word in the statute that we may be concerned with is the word "scurrilous." Scurrilous is vileness. It is defined in *Webster's International Dictionary* as follows:

> "Language containing low indecency, or abuse; foul; vile; obscene; vulgar."

We scarcely need mention that by no stretch of the imagination could it be contended that any of the language in this card would come under the term "scurrilous."

One of the best statements counsel was able to procure as to whether or not any of the language or words appearing on the cards in question were libelous, defama-

tory, etc., is contained in the opinion in the case of *Reid vs. Prov. Journal Co.,* 20 R. I. 120, 37 Atl. 637. The action in that case was one for libel based upon the publication by the defendant of the following item:

> "Thrice Burned, the Daniels & Cornell Block Again Visited by Fire. Damage largely by water, and estimated at $70,000, covered by insurance. At 10 o'clock last night * * * discovered smoke and flame * * *. The fiery element completely invaded the fifth floor, which was all occupied by the Messrs. Reid, who claim complete loss from fire and water. They were insured for $55,000. * * * The fire is the third to have occurred in this building in the past thirteen years. * * * Every fire in this building has started on the upper floor, and twice in Reid's printing establishment."

The court said of this article:

> "The article in question contains no defamatory language, nor do we think it is capable of the meaning attributed to it in the innuendo. It is simply a statement of an occurrence which was a proper subject of public notice and comment, and does not in any way reflect upon the *character* of the plaintiffs. * * * The only portion of the article which by any possibility could be tortured into a charge that the plaintiffs were in some way *criminally* responsible for the fire referred to is the last sentence thereof, but language is not to be forced or tortured in libel cases in order to make it actionable. It is to be taken in its plain and ordinary sense. * * * The person must be presumed to have used them in their ordinary import * * *. In the case of Roberts v. Camden, 9 East 93, the court said:

> 'Words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them.' The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein, is not sufficient to make it libelous."

And the court cites with approval the language in *Terwilliger vs. Wands*, 17 N. Y. 57:

> *"The words must be defamatory in their nature, and must in fact disparage the character,* and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately as a fair and natural result. In this view of the law, words which do not degrade the character, do not injure it, and cannot occasion loss."

Section 335, Title 18, *U. S. C.*, is decidedly more exacting in the quality of words and language used than a civil action of libel or defamation, because innuendo may not aid the pleader under this section. The language and words published must be libelous per se.

An analysis of these two cards discloses no scurrilous, defamatory or libelous language calculated and obviously intended to reflect injuriously upon the character of Mr. Cunningham; nor do we think it is capable of having any such meaning attributed to it, even if it were permissible under the law (which it is, of course, not) by any allegations of innuendo.

Let us consider first the card set forth as overt act No. 8 of Count I (Plaintiff's Exhibit 13). There is not

a single imputation of dishonesty in any word or line, neither does it question Mr. Cunningham's integrity or veracity. It undoubtedly raises the question of the wisdom of the voters sending a poor business man to participate in the handling of the business affairs of a large municipal corporation; and in support of this contention points out the fact that the management of the affairs of the student body was such that in the place of a surplus, a very substantial deficit resulted. By no stretch of the imagination can it be said that there is a single word in this card which indicates that Mr. Cunningham was guilty of any misapplication of funds. A man's capacity for the successful management of a business institution is quite distinct from his character as a man.

That one is lacking in these qualities over another has nothing to do with his character. Character essentially relates to the traits of honesty, integrity, veracity and morality. What was said in this card would be little different than expressing the opinion of another as being either a poor cook, a poor washerwoman, or a poor driver. Such assertions as these relate only to one's qualifications for efficiency of service and do not impart any delinquencies in the qualities of mind and morals that make up character.

All that we have said concerning this card can be said of the card appearing as overt act No. 5. We need concern ourselves only with testing the phrase "and since his gross mismanagement of finances there has led to his dismissal," as this is the only phrase which by any possibility could be tortured into an injurious reflection upon

Mr. Cunningham's character. Of this we contend that it is but a simple statement of an occurrence which was a proper subject of public notice and comment and does not in any way reflect upon Mr. Cunningham's character. To give such an effect to it would require a "forced" or "tortured" construction. The word "mismanagement" does not impute misapplication. Anyone may mismanage without being guilty of acts of dishonesty; in fact unsuccessful or neglectful management is misminagement. It partakes of the qualities of mistakes, inaccurate judgments, neglect and inefficiency. The word "gross" only characterizes the degree. The only plain and logical inference to be drawn from this statement is that Mr. Cunningham in a great degree lacked the qualities of an astute manager of income and potential income of the student body of the university. His dismissal may have been occasioned by dissipating the opportunities for potential revenues which might have enhanced the coffers of the student body, i.e., by the issuance of too many passes to athletic tournaments and social events given by the student body, failure to make a profitable banking arrangement (as was permissible in those days), whereby on deposits in excess of $1000.00 a 2% interest rate would be paid to the student body account, and for any number of reasons that the imagination might suggest could have enhanced the financial position of the student treasury. Again, the deficit may in part have resulted from extravagances for entertainment and displays at tournaments and social events of the student body. In short, a person may be the finest individual on earth and yet mismanage finances or a business. It

is idle to say that this phrase or any language in either of the two cards on its face per se charges Mr. Cunningham with being dishonest, indecent, or vile, or holds him up to hatred, contempt or ridicule.

In *Webster's New International Dictionary,* the word "mismanagement" is defined: "Wrong, bad, and bungling management; mal administration." In Words and Phrases, 2nd Ser., Vol. III, under the term "Mismanagement" the following authority is cited:

> "An allegation in an application for removal of a receiver of a company that the officers of the company mismanaged its affairs is not libelous or scandalous of the officers. The word 'mismanaged' not denoting any wrong or turpitude on the part of the persons managing. Lebovitch v. Jos. Levy & Bros. Co., 54 So. 978, 981, 128 La. 518."

In connection with this subject it is well to bear in mind the difference between criminal libel and civil libel. It is only in the case of civil libel that injuries to a man in his occupation are libelous; and this is not applicable here, because there is no charge in any of these cards as to any business of Mr. Cunningham. The fine character of Mr. Cunningham as a man is not in the slightest affected by either of these cards.

Conclusion

Before any conviction under this section should ever be sustained, the language used should plainly and clearly come within the purview of the statute, forsooth that statements of occurrences which are a proper subject of public notice and comment are not suppressed.

The government of the United States in administering this section should be actuated by the highest sense of right and justice to all, never losing sight of the fact that in carrying out the purpose of the government, the rights of the citizen and the public, as defined and given by the Constitution, must be observed and respected, and that the right of free speech and the freedom of the press must be protected.

U. S. v. Journal Co., 197 Fed. 415.

We have at length urged this latter proposition upon the court because of its vital importance to the public, and also because of our belief that although the case must be reversed for other errors occurring during the trial, that a reversal upon the grounds that these cards do not come within the purview of the statute will dispose of the cause without it being remanded for a new trial.

Respectfully submitted,

OTTO CHRISTENSEN,
Attorney for Appellant.

No. 7721

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES S. McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES S. McKNIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLEE

In view of the fact that counsel for the appellant has waived the alleged errors embraced in propositions 1 and 2, found on pages 13 and 14 of his brief, as well all assignments of error supporting these two propositions, the first of which dealt with the failure of the Court to give certain instructions mentioned in the first assignment of error, and the other assignment dealing with the statement of the Court with reference to the entry of a plea of nolo contendere, attention will only be given in this brief to the third assignment of error, on page 16 of appellant's brief, which discusses the question of whether or not the two postal cards in question violate Section 335, Title 18, *U.S.C.A.*

The writing by which these two assignments of error are waived is on file in the office of the Clerk of this Court, signed by attorney for appellant.

Section 335 of Title 18, *U.S.C.A.*, declares non-mailable "any postal card upon which any delineations, epithets, terms or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another."

In this case the postal cards introduced in evidence, and which testimony showed the defendant either mailed or caused to be mailed, are set out in appellant's brief on pages 2 and 3, respectively, but attention of the Court is called to the fact that the postcard set out on page 3 of appellant's brief, which said card has been certified by the Clerk of the District Court to this Honorable Court, has upon the margin thereof a drawing showing a man being kicked down the stairway of a building represented to be the University of California at Los Angeles, and in one hand of this person being kicked out is a bag or sack which has printed signs and numerals representing $126,000.

Appellant in his brief on page 3 makes the statement that in the first count Overt Act No. 8 only alleges the printing of this card for mailing. An inspection of the indictment will reveal that Overt Act No. 8, on page 4 of the indictment, states: "Said defendants deposited and caused to be deposited in the United States mails, within the City of Los Angeles, one of said postal cards mentioned in Overt Act No. 1 hereof."

> "Whether or not the matter is scurrilous, defamatory or calculated by the terms or manner or style of display and obviously intended to reflect injuri-

ously upon the character or conduct of another is a question of fact for the jury."

U. S. v. Dodge, Dist. Ct. Pennsylvania, 1895, 70 Fed. 235.

"Whether a writing is scurrilous when used on a postal within the meaning of the statute is properly a question for the jury."

U. S. vs. Olney, Dist. Ct. Tenn. 1889, 38 Fed. 328.

"It is a question of fact for the jury whether the display of certain words upon an envelope would support an indictment."

U. S. v. Brown, Cir. Ct. Vermont 1890, 43 Fed. 135.

"When the language of a writing or letter is capable of two constructions or meanings, one within and the other without the statute, it may be for the jury to say whether or not it offends against the statute and is non-mailable."

U. S. v. Davidson, 244 Fed. 533.

"The obnoxious character of the writing is a question of fact for the jury and not of law for the court."

U. S. v. Davis, 38 Fed. 327.

In the cases cited in appellant's brief, they have to do with language on the envelope of letters, which language in itself does not convey any meaning calculated to reflect injuriously upon the character of another. As an illustration, in the *Davidson* case, cited by appellant,

244 Fed. 523, it was a sealed letter on the envelope of which was the word "Pros." and the court in that case said:

> "The injurious and slanderous meaning concealed from the general public and unknown to it, and only known to the writer and recipient of the envelope and enclosed communication, could not bring the case within the statute."

And in the case of *U. S. c. Davis,* 59 Fed. 357, cited by appellant, the word "notorious" appeared on the envelope and the court properly held that this in itself was not within the statute.

In the instant case the conclusion seems inevitable that these postal cards sent through the mails, bearing as they did a statement that Cunningham was guilty of gross mismanagement of finances at the University, accompanied by the drawing showing Cunningham being booted down the stairway of said University with a sack or bag representing $126.000 in his hand, is defamatory and tends to and is calculated by its very language and delineation to reflect injuriously upon the character of Cunningham and to convey to the mind of the recipient of such postal card the idea that Cunningham was not only guilty of gross mimanagement, but was guilty of theft of the money of the University.

It is inconceivable that any other conclusion might be reached by the recipient of one of these cards bearing

the words and the drawing thereon, and it is repectfully submitted that the postcards are clearly within the statute and that the judgment of the lower court should be affirmed.

PEIRSON M. HALL,
United States Attorney.

HUGH L. DICKSON,
Assistant United States Attorney.

Attorneys for Appellee.

No. 7721

In the

United States Circuit Court of Appeals

For the Ninth Circuit.

JAMES S. McKNIGHT,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

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In the

United States Circuit Court of Appeals

For the Ninth Circuit.

JAMES S. McKNIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

Comes Now the United States of America, appellee in the above entitled cause, and presents this its Petition for Rehearing of the above entitled cause and, in support thereof, respectfully shows:

I.

That the opinion of this Honorable Court reversing the judgment of conviction in the above entitled case too narrowly construed and interpreted the statute, namely, 18 *U. S. C.* 335; that the legislative intent, as well as the verbiage of the statute, inhibits the mailing of postal cards with printing or delineations which are calculated by the terms, or manner, or style of display, and obviously intended to reflect injuriously upon the character or conduct of another; that this inhibition is applicable irre-

spective of whether or not the language or delineation is libelous or defamatory per se; that the opinion of this Honorable Court is based on a construction of the statute which makes it necessary that the writing or delineation be libelous; that the principle enunciated by this Honorable Court in its opinion, namely, that the publication of truthful information regarding candidates for public office is for the interest of the public and therefore privileged, is entirely out of harmony with and not a reasonable interpretation of the statute; that the construction of the statute by this Honorable Court is at variance with at least one other circuit court; that the interpretation of the statute by this Honorable Court has placed it in the category of a statute relating to the law of libel; that the legislative intent, as well as the language of the statute, relates to the prevention of the use of the mails for the dissemination of matter which is lewd, libelous, defamatory, threatening or calculated by the terms, or manner, or style of display and obviously intended to reflect injuriously upon the character or conduct of another; that the efficacy of the statute has been destroyed in that offenses enumerated by the legislature have been eliminated to such an extent that for all practical purposes prosecutions henceforward must be based upon either one of two propositions: First, that the language or delineation is lewd; or second, that the same is libelous, and in the event of matter of a libelous nature, truth apparently would defeat the prosecution in that case.

II.

The Rule of Strict Construction Does Not Require That the Narrowest Technical Meaning Be Given to the Words Employed in a Criminal Statute.

United States v. Corbett, 215 U. S. 233, 242:

> "The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and frustration of the obvious legislative intent * * *."

Pickett v. United States, 216 U. S. 456, 461:

> "The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage."

(A) Printed Matter Calculated and Obviously Intended to Reflect Injuriously on the Character or Conduct of a Person Inhibited by the Statute.

Warren v. United States (C.C.A. 8) 183 Fed. 718, 721, 722:

> "It has been frequently held that the statute covers mail matter from creditors and collection agencies addressed to debtors and bearing externally visible charges or imputations of habitual refusal to pay just debts, threats of suit, etc., *not alone because of a threatening character, but because calculated and obviously intended to reflect injuriously upon the character and conduct of others.* (Citing cases.) Aside from the question whether the language employed by the accused is scurrilous, defamatory or threatening, it was *clearly calculated and obviously*

intended to reflect injuriously on the character and conduct of the person named. (Emphasis ours.)

"It needs no discussion to show that such a charge is calculated to reflect injuriously upon one's character and conduct. *And as a prosecution under the statute does not proceed as one for libel, it is immaterial whether the objectionable language be true or false, or whether the accused was actuated by public spirit or private malice.*" (Emphasis ours.)

Griffin v. United States (C.C.A. 1) 248 Fed. 6, 9:

"We have carefully examined the communications upon the postal cards and the pictures in connection therewith and contained thereon *and are of the opinion that they were calculated by the terms and manner of display and obviously intended to reflect injuriously upon the character and conduct of the person* to whom they were addressed, and that some of them also contained language of a scurrilous and defamatory character within the meaning of the provisions of the act in question." (Emphasis ours.)

Dunning Letters Which By Their Style of Display Reflect Injuriously Have Been Held to Be Inhibited By the Statute.

United States v. Brown, (C. C. Vt.) 43 Fed. 135;

United States v. Dodge (D. C. Pa.) 70 Fed. 235;

United States v. Simmons (D. C. Conn.) 61 Fed. 640.

(B) It is a Question for the Jury Whether Delineation or Printing is Calculated to Affect Injuriously.

United States v. Dodge (D. C. Pa.) 70 Fed. 235;
United States v. Olney (D. C. Tenn.) 38 Fed. 328;
United States v. Davis, 38 Fed. 327;
Botsford v. United States, (C.C.A. 6) 215 Fed. 510.

(C) United States May Prohibit the Carriage by Mail of Such Things as It Pleases.

American Civil Liberties Union v. Kiely (C.C.A. 2), 40 Fed. (2d) 451.

Conclusion

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of conviction of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

PEIRSON M. HALL,
United States Attorney,

CHARLES H. CARR,
Assistant U. S. Attorney,
Attorneys for Appellee.

Certificate of Counsel

I, counsel for the above named United States of America, do hereby certify that the foregoing Petition for Rehearing of this cause, in my opinion, is well founded and that it is not interposed for delay.

PEIRSON M. HALL,
United States Attorney.

No. 7728

United States

Circuit Court of Appeals

For the Ninth Circuit.

REGINA MARTZ and A. J. MARTZ,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

No. 7728

United States

Circuit Court of Appeals

For the Ninth Circuit.

REGINA MARTZ and A. J. MARTZ,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:
W. W. WALLACE, Esq.,
C. F. HUTCHINS, Esq.

For Respondent:
EUGENE HARPOLE, Esq.,
ALVA C. BAIRD, Esq.,
M. B. LEMING, Esq.,
DEWITT EVANS, Esq.

Docket No. 53105

REGINA MARTZ,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1931

Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid)

Feb. 24—Copy of petition served on General Counsel.

Apr. 2—Answer filed by General Counsel.

Apr. 7—Copy of answer served on taxpayer—Circuit Calendar.

1933

Aug. 3—Hearing set for week of Sept. 25, 1933, Long Beach, Calif.

Sept. 25—Hearing had before Mr. Van Fossan, Division 9, on merits. Stipulation of facts filed. Briefs due Oct. 25, 1933—no exchange.

Oct. 10—Transcript of hearing Sept. 25, 1933 filed.

Nov. 10—Motion for extension of 30 days to file brief filed by taxpayer. Brief lodged by taxpayer.

Nov. 13—Motion granted.

Nov. 25—Motion for order to show cause why stipulation of facts should not be set aside filed by General Counsel.

Dec. 1—Hearing set Dec. 20, 1933 on motion.

Dec. 14—Motion to deny motion filed Nov. 25, 1933 filed by taxpayer (1).

Dec. 20—Hearing had before Mr. Van Fossan, Division 9, on Commissioner's motion to set aside agreed statement of facts—motion held C. A. V.

1934

Jan. 3—Transcript of hearing Dec. 20, 1933 filed.

Feb. 17—Order that the agreed statement of facts be set aside and case be restored to circuit calendar for hearing in Los Angeles, Calif., entered.

Mar. 30—Hearing set for week of 6/4/34, Beverly Hills, California.

1934

June 8—Hearing had before Mr. Adams, Division 12, on merits—submitted. Petitioner's brief due July 9, 1934—Commissioner's brief due July 25, 1934.

June 22—Transcript of hearing June 8, 1934 filed.

July 5—Brief filed by taxpayer. 7/5/34 copy served.

July 5—Motion to consolidate with docket 53106 filed by taxpayer. 7/26/34 granted. [1*]

July 25—Brief filed by General Counsel.

Aug. 9—Memorandum opinion rendered—Mr. Adams, Division 12. Decision will be entered for Commissioner.

Aug. 13—Decision entered—Mr. Adams, Division 12.

Oct. 20—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Nov. 3—Proof of service filed by taxpayer.

Nov. 3—Praecipe filed by taxpayer—approved by General Counsel.

Nov. 16—Motion to withdraw original exhibit and substitute photostat copy filed by General Counsel.

Nov. 19—Motion of 11/16/34 granted.

Dec. 6—Agreed statement of evidence lodged.

Dec. 7—Agreed statement of evidence approved and ordered filed. [2]

---

*Page numbering appearing at the foot of page of original certified Transcript of Record.

APPEARANCES:

For Petitioner:
W. W. WALLACE, Esq.,
C. F. HUTCHINS, Esq.

For Respondent:
EUGENE HARPOLE, Esq.,
ALVA C. BAIRD, Esq.,
M. B. LEMING, Esq.,
DEWITT EVANS, Esq.

Docket No. 53106

A. J. MARTZ,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1931

Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid)

Feb. 24—Copy of petition served on General Counsel.

Apr. 2—Answer filed by General Counsel.

Apr. 7—Copy of answer served on taxpayer—Circuit Calendar.

1933

Aug. 3—Hearing set for week of 9/25/33, Long Beach, California.

Sept. 25—Hearing had before Mr. Van Fossan, on the merits. Stipulation of facts filed. Briefs due Oct. 25, 1933—no exchange.

Oct. 10—Transcript of hearing Sept. 25, 1933 filed.

Nov. 10—Motion for extension of 30 days to file brief, brief tendered, filed by taxpayer.

Nov. 13—Motion granted.

Nov. 25—Motion for order to show cause why stipulation of facts should not be set aside filed by General Counsel.

Dec. 1—Hearing set Dec. 20, 1933 on motion.

Dec. 14—Motion to deny motion filed Nov. 25, 1933 filed by taxpayer (1).

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1934

June 8—Hearing had before Mr. Adams, Division 12, on merits—submitted. Petitioner's brief due July 9, 1934—Commissioner's brief due July 25, 1934.

June 22—Transcript of hearing June 8, 1934 filed.

July 5—Brief filed by taxpayer. 7/5/34 copy served.

July 5—Motion to consolidate with docket 53105 filed by taxpayer. 7/26/34 granted.

July 25—Brief filed by General Counsel. [3]

Aug. 9—Memorandum opinion rendered—Mr. Adams, Division 12. Decision will be entered for Commissioner.

Aug. 13—Decision entered—Mr. Adams, Division 12.

Oct. 20—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Nov. 3—Proof of service filed by taxpayer.

Nov. 3—Praecipe filed by taxpayer—approved by General Counsel.

Nov. 16—Motion to withdraw original exhibit and substitute photostat copy filed by General Counsel.

Nov. 19—Motion of Nov. 16, 1934 granted.

Dec. 6—Agreed statement of evidence lodged.

Dec. 7—Agreed statement of evidence approved and ordered filed. [4]

United States Board of Tax Appeals

Docket No. 53105

REGINA MARTZ,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION:

The above named taxpayer hereby petitions for a redetermination of the deficiency in taxes, if any, as set forth in the Commissioner's Notice of Deficiency, dated January 10, 1931, (Copy attached), and as a basis of these proceedings, alleges as follows:

First: The petitioner is an individual residing in Los Angeles, California.

Second: The Deficiency Notice, a copy of which is attached hereto marked "Exhibit A", was mailed to the petitioner on or about January 10, 1931.

Third: The taxes in controversy are income taxes for the calendar year 1928 and are in the sum of $5,496.20.

Fourth: The determination of the tax as set forth in the Notice of Deficiency, is based on the following errors: [5]

(a) The Commissioner has erred in failing to allow as a deduction the State Inheritance Taxes paid by petitioner, in the sum of $213,521.58, prior

to the passage of the Revenue Act of 1928, and said payment having been made under and in conformity with all of the provisions of the Revenue Act of 1926, which was the law in force and effect when said payment was made.

(b) The Commissioner has erred in giving a narrow construction and interpretation to the provisions of Sec. 703, Revenue Act of 1928, in that he has ruled in effect that while the payment of the Inheritance Tax here in controversy was made under the provisions of the 1926 Revenue Act, that because the net income to be determined is under the Revenue Act of 1928, that said Section and the intent of Congress thereby does not apply.

(c) The Commissioner has erred in giving retroactive effect to any provision of the Revenue Act of 1928 which deprives the petitioner of a legal deduction for payments made under and by virtue of the Revenue Act of 1926, (Payment made May 10, 1928) said Revenue Act of 1926 being in force and effect when said payment by petitioner was made. The petitioner followed the law, to-wit: the Revenue Act of 1926, at the time of the making of payment of the Inheritance Tax to the State of California. At that time it was not known that the 1928 Act would be passed, nor was it known that it would be made retroactive to January 1st, 1928. Petitioner complied with the law as it existed at that time and petitioner contends that it was [6] not the purpose of the retroactive feature of the 1928 Act to inflict a burden on parties who had complied with the 1926 Act then in existence.

(d) The Commissioner has erred in failing to give effect to Sec. 703 of the Revenue Act of 1928 for the reason that the petitioner had paid $213,-521.58 as State Inheritance Tax to the State of California on May 10, 1928, which sum was paid under the existing provisions of the Revenue Act of 1926 which provided that said deduction could only be taken by the heir (which petitioner was) and not by the administrator or executor of the estate, and the Commissioner has failed to give effect to said Section 703 which provides that if the deduction has been claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, and whereas the deduction was claimed by the beneficiary and was not claimed by the estate, and the Commissioner has refused and failed to follow the exceptions set forth in said Section 703 on the 1928 income tax account.

(e) The Commissioner has erred in failing to give effect to Section 703 of the 1928 Revenue Act which provides that if the Inheritance Tax has been paid and claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, whereas the Commissioner has disallowed the claim to the beneficiary after the tax has been paid by petitioner as such beneficiary and allowed said deduction only to the estate. [7]

Fifth: The facts upon which the petitioner relies as a basis for these proceedings are as follows:

(a) The laws of the State of California impose an Inheritance Tax upon the right to receive prop-

erty by bequest or devise. In such cases the Revenue Act of 1926 and the Regulations thereunder allowed as a deduction said payment of Inheritance Taxes by the beneficiary only. In the instant case the properties inherited were principally rental and income producing properties. The sole two heirs at law, not having the necessary funds to pay the Inheritance Taxes to the State of California, and desiring to pay said taxes individually as required by the 1926 Revenue Act, so that the deduction for same could be allowed them on their individual returns, had, after careful inquiry as to the requirements of said Revenue Act of 1926, a partial distribution of the income properties made to them so as to raise the money for the payment of the State Inheritance Taxes, and actually paid said taxes individually under the provisions of the 1926 Revenue Act, then in force and effect.

(b) Upon the passage of the Revenue Act of 1928, made retroactive to January 1, 1928 under Sec. 65 of said Act, the Congress passed and included a saving clause (Sec. 703), which was intended to clarify and allow as deductions for past payments to the one who actually paid the tax and so claimed it.

(c) In the instant case the petitioner paid the Inheritance Tax under the 1926 Act and in conformity therewith for the sole purpose of taking advantage of the law as it then existed. Had the estate paid the tax under the Act of 1926, [8] the estate could not claim the deduction under the

California rule. It is now proposed to deny the deduction to petitioner after he has complied with each step required by the existing law in force at that time (i. e. Revenue Act of 1926) by reason of the retroactive feature of the 1928 Act, (which was passed after said payment) and by denying the application of the saving clause intended by Sec. 703, Act of 1928.

Sixth: The petitioner herein, in support of his appeal, relies upon the following propositions of law:

(a) All of Section 214 Revenue Act of 1926, and Article 134, Regulation 69.

(b) All of Section 703 Revenue Act of 1928.

WHEREFORE, petitioner respectfully prays that this petition be placed upon the Field Calendar for hearing in Los Angeles, California, at an early date, and that this Board may hear and determine the correct tax due, if any, on this petition.

W. W. WALLACE
CHAS. F. HUTCHINS
Counsel for Petitioner
411-14 Central Building
Pasadena, California [9]

State of California,
County of Los Angeles.—ss.

REGINA MARTZ, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements con-

tained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

REGINA MARTZ

Subscribed and sworn to before me this 19th day of February, 1931.

[Notarial Seal] GLADYS GILKS

Notary Public in and for the County of Los Angeles, State of California. [10]

EXHIBIT "A"

TREASURY DEPARTMENT

Washington

Jan. 10, 1931

Office of
Commissioner of Internal Revenue
Miss Regina Martz,
C/o Charles F. Hutchins
Central Building,
Pasadena, California

Madam:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $5,496.20 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States

Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, which ever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner
By J. C. WILMER (Signed)
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870

[11]

STATEMENT

IT:AR:E-1
JE-60D

In re: Miss Regina Martz,
c/o Charles F. Hutchins,
Central Building,
Pasadena, California.

TAX LIABILITY

Year—1928.
Corrected Tax Liability—$5,496.20.
Tax Previously Assessed—None.
Deficiency—$5,496.20.

Reference is made to the report of the internal revenue agent in charge, Los Angeles, California, for the year 1928 and to your protest submitted June 25, 1930.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference held with your representatives on August 18, 1930, in the office of the agent in charge. The adjustments recommended by the agent as the result of the conference have been approved by this office.

It was contended that the administrator followed the Revenue Act and Regulations in force at the time of the payment of the inheritance tax which was the Revenue Act of 1926, and since under the California law this tax is levied upon the right to receive, in accordance with the Revenue Act of

1926 the tax paid was deductible by the beneficiaries. It was further contended that the retroactive feature of section 703(a) (2) of the Revenue Act of 1928 when given the interpretation proposed by the revenue agent is in violation of the constitution and further that if the construction set forth by the administrator of section 703(a) (2) cannot be complied with, the entire net income from rents should be considered income to the estate and the deduction for taxes paid be deducted from the total net income.

Section 23(c) of the Revenue Act of 1928 provides that estate and inheritance tax shall be allowed as a deduction only to the estate. Section 53(a) states that returns made on the calendar year shall be made on or before the fifteenth day of March following [12] the close of the calendar year, and under this provision the 1928 returns are governed by the Revenue Act of 1928 which was effective January 1, 1928, as provided in section 65 of the Act. Under the existing law this office has no prerogative other than to tax the income from assets distributed in 1928 to the distributees and to allow the estate the deduction for inheritance taxes.

The adjustments in your tax liability are indicated below:

Net income reported on return	Loss	$160,183.45
Add:		
1. Inheritance tax disallowed		213,521.59
Total		$ 53,338.13
Deduct:		
2. Depreciation		1,536.31
Net income adjusted		$ 51,801.82

Computation of Tax

Net income adjusted	$ 51,801.82
Less:	
Personal exemption	1,500.00
Net income subject to normal tax	$ 50,301.82
Normal tax at 1½% on $4,000.00	$ 60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $42,301.82	2,115.09
Surtax on $51,801.82	3,214.24
Total Tax	$ 5,509.33
Less:	
Earned income credit	13.13
Tax assessable	$ 5,496.20
Tax previously assessed	none
Deficiency	$ 5,496.20

[13]

Explanation of Changes

1. As explained above.

2. Depreciation has been allowed at the rate of 3 1/3% on the property owned except in the case of the 2 1/2 story brick building in which case 4% has been allowed. No depreciation has been allowed on the frame flats as depreciation taken in 1927 exhausted the cost.

[Endorsed]: Filed Feb. 24, 1931. [14]

[Title of Court and Cause—Docket No. 53105.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of the First paragraph of the petition.

(2) Admits the allegations of the Second paragraph of the petition.

(3) Admits the allegations of the Third paragraph of the petition.

(4) Denies the respondent erred in the determination of the deficiency as alleged in subparagraphs (a) to (e), inclusive, of the Fourth paragraph of the petition.

(5) Denies the allegations of fact contained in subparagraphs (a) to (c), inclusive, of the Fifth paragraph of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed April 2, 1931. [15]

[Title of Court and Cause—Docket No. 53106.]

PETITION

The above named taxpayer hereby petitions for a redetermination of the deficiency in taxes, if any, as set forth in the Commissioner's Notice of Deficiency, dated January 10, 1931, (copy attached) and as a basis of these proceedings, alleges as follows:

First: The petitioner is an individual residing in Los Angeles, California.

Second: The Deficiency Notice, a copy of which is attached hereto marked "Exhibit A", was mailed to the petitioner on or about January 10, 1931.

Third: The taxes in controversy are income taxes for the calendar year 1928 and are in the sum of $14.581.35.

Fourth: The determination of the tax as set forth in the Notice of Deficiency, is based on the following errors: [16]

(a) The Commissioner has erred in failing to allow as a deduction the State Inheritance Taxes paid by petitioner, in the sum of $213,521.58, prior to the passage of the Revenue Act of 1928, and said payment having been made under and in conformity with all of the provisions of the Revenue Act of 1926, which was the law in force and effect when said payment was made.

(b) The Commissioner has erred in giving a narrow construction and interpretation to the provisions of Sec. 703, Revenue Act of 1928, in that he has ruled in effect that while the payment of the inheritance tax here in controversy was made under the provisions of the 1926 Revenue Act, that because the net income to be determined is under the Revenue Act of 1928, that said Section and the intent of Congress thereby does not apply.

(c) The Commissioner has erred in giving retroactive effect to any provision of the Revenue Act of 1928 which deprives the petitioner of legal deduction for payments made under and by virtue of the Revenue Act of 1926, (Payment made May 10, 1928) said Revenue Act of 1926 being in force and effect when said payment by petitioner was made. The petitioner followed the law, to-wit: the Revenue Act

of 1926, at the time of the making of payment of the Inheritance Tax to the State of California. At that time it was not known that the 1928 Act would be passed, nor was it known that it would be made retroactive to January 1st, 1918. Petitioner complied with the law as it existed at that time and petitioner contends that it was not the purpose of the retroactive feature of the 1928 Act to inflict a burden on parties who had complied with the 1926 Act then in existence. [17]

(d) The Commissioner has erred in failing to give effect to Sec. 703 of the Revenue Act of 1928 for the reason that the petitioner had paid $213,-521.58 as State Inheritance Tax to the State of California on May 10, 1928, which sum was paid under the existing provisions of the Revenue Act of 1926, which provided that said deduction could only be taken by the heir (which petitioner was) and not by the administrator or executor of the estate, and the Commissioner has failed to give effect to said Section 703 which provides that if the deduction has been claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, and, whereas the deduction was claimed by the beneficiary and was not claimed by the estate, and the Commissioner has refused and failed to follow the exceptions set forth in said Section 703 on the 1928 income tax account.

(e) The Commissioner has erred in failing to give effect to Section 703 of the 1928 Revenue Act which provides that if the inheritance tax has been

paid and claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, whereas the Commissioner has disallowed the claim to the beneficiary after the tax has been paid by petitioner as such beneficiary and allowed said deduction only to the estate.

Fifth: The facts upon which the petitioner relies as a basis for these proceedings are as follows:

(a) The laws of the State of California impose an inheritance tax upon the right to receive property by bequest or devise. In such cases the Revenue Act of 1926 and the Regula- [18] tions thereunder allowed as a deduction said payment of inheritance taxes by the beneficiary only. In the instant case the properties inherited were principally rental and income producing properties. The sole two heirs at law, not having the necessary funds to pay the inheritance taxes to the State of California, and desiring to pay said taxes individually, as required by the 1926 Revenue Act, so that the deduction for the same could be allowed them on their individual returns, had, after careful inquiry as to the requirements of said Revenue Act of 1926, a partial distribution of the income properties made to them so as to raise the money for the payment of the State Inheritance Taxes, and actually paid said taxes individually under the provisions of the 1926 Revenue Act, then in force and effect.

(b) Upon the passage of the Revenue Act of 1928, made retroactive to January 1, 1928, under Sec. 65 of said Act, the Congress passed and in-

In accordance with Section 72 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner,

By J. C. WILMER,

Deputy Commissioner.

Enclosures:

Statement

Form 882

Form 870 [22]

STATEMENT

IT:AR:E-1
JE-60D

In re: Mr. A. J. Martz,
c/o Charles F. Hutchins,
Central Building,
Pasadena, California.

TAX LIABILITY

Year—1928
Corrected Tax Liability—$14,581.53
Tax Previously Assessed—None
Deficiency—$14,581.53

Reference is made to the report of the internal revenue agent in charge, Los Angeles, California, for the year 1928 and to your protest submitted June 25, 1930.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference held with your representatives on August 18, 1930 in the office of the agent in charge. The adjustments recommended by the agent as the result of the conference have been approved by this office.

It was contended that the administrator followed the Revenue Act and Regulations in force at the time of payment of the inheritance tax which was the Revenue Act of 1926 and since under the California law this tax is levied upon the right to receive, in accordance with the Revenue Act of 1926

the tax paid was deductible by the beneficiaries. It was further contended that the retroactive feature of section 703(a)(2) of the Revenue Act of 1928 when given the interpretation proposed by the revenue agent is in violation of the constitution and further that if the construction set forth by the administrator of section 703(a)(2) cannot be complied with the entire net income from rents should be considered income to the estate and the deduction for taxes paid be deducted from the total net income.

Section 23(c) of the Revenue Act of 1928 provides that estate and inheritance tax shall be allowed as a deduction only to the estate. Section 53(a) states that returns made on the calendar year shall be made on or before the fifteenth day of March following the close of the calendar year, and under this provision the 1928 returns are governed by the Revenue Act of 1928 which was effective January 1, 1928 as provided in section 65 of the Act. Under the existing law this office has no prerogative other than to tax the income from assets distributed in 1928 to the distributees and to allow the estate the deduction for inheritance taxes. [23]

The adjustments in your tax liability are indicated below:

Net income reported on return	Loss	$116,137.91
Add:		
1. State inheritance tax disallowed		213,521.58
Total		$ 97,383.67
Deduct:		
2. Interest	$ 398.20	
3. Depreciation	1,869.68	2,267.91
Net income adjusted		$ 95,115.76

Computation of Tax

Net income adjusted	$ 95,115.76
Less:	
Personal Exemption	3,900.00
Net income subject to normal tax	$ 91,215.76
Normal tax at 1½% on $4,000.00	$ 60.00
Normal tax on 3% on $4,000.00	120.00
Normal tax at 5% on $83,215.76	4,160.79
Surtax on $95,115.76	10,731.99
Total tax	$ 15,072.78
Less:	
Earned income credit	491.25
Tax assessable	$ 14,581.53
Tax previously assessed	None
Deficiency	$ 14,581.53

Explanation of changes

1. Explained above.

2. Interest reported on the return of your sister has been eliminated in your return of income. [24]

Explanation of Changes
(Continued)

3. Depreciation has been allowed at the rate of 3-1/3% on the property owned except in the case of the 2½ story building and the frame and concrete residence in which cases 4% has been allowed as reasonable rate of depreciation. No depreciation has been allowed on the frame flats as depreciation taken in 1927 exhausted the cost.

[Endorsed]: Filed Feb. 24, 1931. [25]

[Title of Court and Cause—Docket No. 53106.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of the First paragraph of the petition.

(2) Admits the allegations of the Second paragraph of the petition.

(3) Admits the allegations of the Third paragraph of the petition.

(4) Denies the respondent erred in the determination of the deficiency as alleged in subparagraphs (a) to (e), inclusive, of the Fourth paragraph of the petition.

(5) Denies the allegations of fact contained in subparagraphs (a) to (c), inclusive, of the Fifth paragraph of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed April 2, 1931. [26]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

W. W. Wallace, Esq., for the petitioners.
Dewitt Evans, Esq., for the respondent.

MEMORANDUM OPINION.

ADAMS: These cases involve income tax liability. They were consolidated for hearing and decision.

The petitioners request redetermination of deficiencies asserted against them for the year 1928.

The facts are not in dispute. Petitioners are the heirs of Elizabeth Martz who died November 20, 1927. Her estate was pending in 1928. On May 10, 1928, petitioner A. J. Martz, as administrator of his mother's estate, paid $427,043.16 inheritance taxes to the State of California out of the funds of the estate. On May 29, 1928, partial distribution of the estate was made to the petitioners as distributees, which estate consisted of income producing real estate. The hearing on the petition for partial distribution [27] and the order were as of May 29, 1928, at 2:00 o'clock P.M. and the order was filed May 31, 1928. The income from the real estate so distributed to the petitioners amounted to approximately $21,000 per month. The petitioners in their individual income tax returns for the year 1928, filed in March 1929, each claimed as deduction one-half of the inheritance tax paid by the estate which amounted to $213,521.58, each. A. J. Martz, as administrator of the estate, in the income tax return of the estate for the year 1928, did not take the amount of the inheritance tax as a deduction. The respondent disallowed these amounts as deductions from the income of the petitioners.

In the 60-day letter addressed to the petitioners, the respondent among other things said: "Under the existing law, this office has no prerogative other than to tax the income from assets distributed in 1928 to the distributees and to allow the estate the

deduction for inheritance taxes."

The petitioners contend that under the provisions of Section 703 of the Revenue Act of 1928 that the deduction claimed by them as beneficiaries should have been allowed to them by the respondent and not to the estate.

Section 23-C of the Revenue Act of 128 provides:

> "* * * For the purpose of this subsection, estate, inheritance, legacy, and succession taxes accrue on the due date thereof, except as otherwise provided by the law of the jurisdiction imposing such taxes, and shall be allowed as a deduction only to the estate. * * *"

Section 65 of the Revenue Act of 1928 provides:

> "This title shall take effect as of January 1, 1928. * * *"

Under provisions of the statute, the action of the Commissioner in disallowing the deductions claimed by the petitioners was correct. There seems [28] to be no doubt as to the constitutionality of the act insofar as these provisions are concerned.

In the case of Elmon C. Gillette v. Commissioner, 29 B. T. A. 561, we had before us the same question which is presented here. The holding in that case disposes of all questions presented on this appeal adversely to the contentions of the petitioners.

The determination of the respondent is approved.

Enter:

Decision will be entered for the respondent.

[Endorsed]: Entered Aug. 9, 1934. [29]

United States Board of Tax Appeals
Washington

Docket No. 53105

REGINA MARTZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion, entered August 9, 1934, it is

ORDERED and DECIDED: That there is a deficiency of $5,496.20 for the year 1928.

Enter:

[Seal] (s) JED C. ADAMS
Member.

Entered: Aug. 13, 1934. [30]

United States Board of Tax Appeals
Washington

Docket No. 53106

A. J. MARTZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion, entered August 9, 1934, it is

ORDERED and DECIDED: That there is a deficiency of $14,581.53 for the year 1928.

Enter:

[Seal] (s) JED C. ADAMS
Member.

Entered: Aug. 13, 1934. [31]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

PETITION OF THE TAXPAYERS FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, OF A DECISION BY THE UNITED STATES BOARD OF TAX APPEALS.

Taxpayers, the petitioners under Docket Nos. 53105 and 53106, in this cause, which were duly

consolidated for hearing and decision by the Board, by W. W. Wallace and Chas. F. Hutchins, counsel, hereby file their petition for review by the United States Circuit Court of Appeals, Ninth Circuit, of the decisions by the United States Board of Tax Appeals rendered on August 13, 1934, determining deficiencies in each of the petitioners Federal income taxes for the calendar year 1928, in the sum of $5,496.20 as to Regina Martz and in the sum of $14,581.53 as to A. J. Martz, and respectfully shows: [32]

I.

The petitioners are residents of the City of Los Angeles, State of California, and therefore, pursuant to the provisions of Section 1002 of the Revenue Act of 1932 and 1934 as amended, request that the aforesaid decision of the Board of Tax Appeals may be reviewed by the United States Circuit Court of Appeals, Ninth Circuit.

II.

NATURE OF CONTROVERSY.

This controversy involves a proper determination of the liability of each of the petitioners for Federal income taxes for the calendar year 1928.

The petitioners are the only children of Elizabeth Martz, who died November 30th, 1927.

A. J. Martz, the son, was appointed administrator of his mother's estate.

On May 10, 1928, he paid to the State of California inheritance taxes due from himself and his

sister upon their inheritance the sum of $427,043.16. Practically all of the inherited property was situated in the downtown district of the City of Los Angeles.

The Petition for Partial Distribution was filed by petitioners on May 12, 1928. Thereafter, and on May 29, 1928, a Decree of Partial Distribution was made in the Estate of Elizabeth Martz wherein there was distributed to petitioners practically all of the income-producing property in this estate. This was done so that each of the petitioners would receive the income thereafter during that calendar year. It was their purpose to deduct the above mentioned inheritance taxes paid by them [33] from their gross income. Said gross income being the rents from the property distributed to them on May 29, 1928.

At that time, under the Revenue Act of 1926 then in force and effect, and, in some instances, under the 1928 Revenue Act later passed, these inheritance taxes were deductible by the heirs.

The income on the real estate distributed on May 29, 1928, amounted to about $21,000. per month.

Each of the petitioners was liable for one half of the aforementioned inheritance tax, or the sum of $213,521.58, as the law of California bases the tax upon property received.

At the time of the payment of the said inheritance tax on May 10, 1928, neither of the petitioners had any knowledge or information as to any changes in the Revenue Act with relation to deductions of

taxes paid but on the other hand made inquiry at the local Collector's offices as to the proper procedure in order to take advantage of the inheritance taxes paid as a proper deduction for income tax purposes. Following the information furnished by the said Collector's office that the inheritance tax paid to the State of California, by residents thereof, was only allowed as a deduction to the one upon whom the tax was imposed, the petitioners herein secured the partial distribution mentioned as of May 29, 1928, and in filing their income tax returns for the year 1928 they claimed as a deduction, under Section 214-(a) (3); Revenue Act of 1926, the inheritance taxes disallowed herein by the Respondent. [34]

Upon the passage of the Revenue Act of 1928 Section 23 provided for the deduction of inheritance taxes by the estate.

Section 703 of the 1928 Revenue Act provides that in determining the net income of an heir, devisee, legatee, distributee, or beneficiary, the amount of estate, inheritance, legacy, or State inheritance taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

1. If the deduction has been claimed by the estate but not by the beneficiary, it shall be allowed to the estate.

2. If the deduction has been claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary.

The deduction was claimed by the beneficiaries (the petitioners herein), and not by the estate. Petitioners herein complied with the laws and regulations in force at the time of payment of the inheritance tax, and took the deduction in good faith on their 1928 income tax return.

The Commissioner of Internal Revenue held that the inheritance taxes paid could only be claimed by the estate and denied the deduction as claimed by the two heirs at law in their individual returns for the year 1928.

III.

The petitioners, being aggrieved by the findings and opinion of the Board, and by its decision entered pursuant thereto, desire to obtain a review thereof by the United States Circuit Court of Appeals, Ninth Circuit. [35]

IV.

ASSIGNMENTS OF ERROR.

The petitioners assign as error the following acts and omissions of the United States Board of Tax Appeals:

(1) The failure to allow as a deduction from each of the petitioners gross income for the year 1928 the inheritance taxes paid on May 10, 1928, to the State of California, while the 1926 Revenue Act was still in force and effect.

(2) The failure to find that Section 703, Revenue Act of 1928, allows the deduction claimed the

distributees of the estate when claimed by them in their return and not claimed by the estate.

(3) The finding of deficiencies for the year 1928 in lieu of a determination that there is no additional income tax due from either of the petitioners herein for the year 1928.

W. W. WALLACE
CHAS. F. HUTCHINS
Counsel for Petitioners
404 Higgins Building
Los Angeles, California [36]

State of California,
County of Los Angeles.—ss.

W. W. Wallace, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the foregoing petition and is familiar with the statements contained therein; and that the statements made are true to *be* best of his knowledge, information and belief.

W. W. WALLACE

Subscribed and sworn to before me this 14 day of October, 1934.

[Seal] GLADYS GILKS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 20, 1934. [37]

[Title of Court and Cause—Nos. 53105-53106.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above entitled cases. These cases came on for hearing before the Honorable Jed C. Adams, Member of the United States Board of Tax Appeals, on June 8, 1934. W. W. Wallace, Esq., appeared for the petitioners and DeWitt M. Evans, Special Attorney, Bureau of Internal Revenue, appeared for the respondent.

AUGUST J. MARTZ,

being first duly sworn, was called as a witness on behalf of the petitioners and testified as follows:

Direct Examination.

I am one of the petitioners. Regina Martz is my sister. My mother was Elizabeth Martz, who died in November, 1927. In the month of May, 1928, I paid the inheritance tax levied and assessed by the State of California to the County Treasurer of this County. [38]

At this point there was offered and received in evidence as PETITIONER'S EXHIBIT 1, a receipt which reads as follows:

(Testimony of August J. Martz.)

Triplicate (for person paying tax)

No. 11889.

Office of the Treasurer of Los Angeles County, State of California.

Receipt for Inheritance or transfer tax upon property passed from Elizabeth Martz, deceased, who died Nov. 30, 1927.

Received of August J. Martz, administrator of the estate of the above-named deceased, the sum of Four hundred twenty-seven thousand forty three and 16/100 Dollars, being the amount of the inheritance or transfer tax due the State of California under the provisions of the inheritance or transfer tax laws of said state upon the following gifts, legacies, inheritances, bequests, successions and transfers as determined and fixed by an order of the Superior Court of the above-named county, in the matter of the estate of the above-named deceased,

Heretofore)
to be hereafter) duly made and entered therein.

Name	Relationship	Value of Property	Received	Tax
#92490				
Payment on account				449,519.12
Amount of Tax				449,519.12
Amount of rebate (if paid within six months)				22,475.96

(Testimony of August J. Martz.)

Amount of interest (at seven per cent)

Amount of interest (at ten per cent)

Amount due STATE 427,043.16

Countersigned ..... 19..... Dated 5-10 1928

.....

Controller of State

By.....

Deputy.

(stamped) H. L. BYRAM
County Treasurer
By /sgd/ R. CROSSMAN
Deputy Treasurer. [39]

There was then offered and received in evidence certificate dated June 6, 1934, of L. E. Lampton, County Clerk by Mary Frye, Deputy, as PETITIONER'S EXHIBIT 2.

PETITIONER'S EXHIBIT 2

Admitted in Evidence June 8, 1934

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

CERTIFICATE OF COUNTY CLERK.

State of California,

County of Los Angeles.—ss.

L. E. LAMPTON, County Clerk of Los Angeles County, California, and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, does hereby certify:

(Testimony of August J. Martz.)

That there was pending in the Probate Department of the County Clerk's office a certain probate matter entitled "In the Matter of the Estate of Elizabeth Martz, deceased," which probate number was 92490, probate records of the said office.

That the undersigned County Clerk is the custodian of the said records, and that there appears among the files in the papers of the said estate a Petition for Partial Distribution which was filed with the papers of the said estate in the undersigned's office on the 12th day of May, 1928. [43]

That, upon the filing of the said Petition, the same was set for hearing before the court on May 29th, 1928, at two o'clock p. m. That on the date last mentioned, said Petition for Partial Distribution was heard, was granted by the court, and an order was made and entered distributing the properties referred to in the said Petition to August Martz and Regina Martz.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 6th day of June, 1934.

L. E. LAMPTON, County Clerk,
[Seal] By (s) MARY FRYE,
Deputy. [44]

The witness further testified as follows:

I was present in court on the 29th day of May, 1928, when the petition for partial distribution was

(Testimony of August J. Martz.)

granted. The properties mentioned in that petition produced revenue. My sister and I received that joint revenue.

"Q. For the calendar year 1928 did you file an income tax return?

A. We did.

Q. In March, 1929?

A. We did.

Q. In that return did you claim as a deduction one half of the taxes that were paid, as shown by this receipt?

A. Yes.

Q. I will ask you if one half of that sum that is shown by that receipt was on your inheritance from your mother.

A. Yes.

Q. Who was the administrator of that estate, Mr. Martz?

A. I was the administrator.

Q. As such administrator and for the calendar year did you file an income tax return in March, 1929?

A. For the estate.

Q. Yes. Included in that was the income you had received as administrator, was it?

A. It was.

Q. In the return so filed by you did you claim any deduction [40] on account of this inheritance tax that you and your sister had paid?

A. No, sir.

(Testimony of August J. Martz.)

Q. You did not?

A. No."

Cross Examination

The $427,000.00, taxes paid for this estate, was paid out from the estate. The check was signed by me as administrator, on the funds of the estate.

"Q. Did you pay an income tax for the year 1928?

A. No. You mean as an individual?

Q. Yes, sir, as an individual.

A. No, we did not have to, after taking the deduction that I understood we were allowed under the law."

I do not recall whether or not my sister paid any income tax. The properties that I received from the estate consisted of real property. It was income producing property. The income received by both my sister and myself during 1928 from these properties, after the partial distribution, was about $21,000.00 a month. This property was finally distributed equally to me and to my sister, and the income was divided equally.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the petitioner on review.

CHARLES F. HUTCHINS

W. W. WALLACE

Attorneys for Petitioners on Review. [41]

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of this record, this statement of evidence is duly approved and settled this 7th day of Dec., 1934.

(s) JED C. ADAMS
Member, United States Board
of Tax Appeals.

[Endorsed]: Filed Dec. 7, 1934. [42]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Cir-

cuit Court of Appeals, Ninth Circuit, with reference to petition for review heretofore filed by the petitioners in the above named cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition of redetermination

(b) Answer of Respondent

(c)

(3) The memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioners in the above cause.

(6) The statement of the evidence with all exhibits attached thereto.

(7) This praecipe.

J. WISEMAN MACDONALD
W. W. WALLACE
CHAS. F. HUTCHINS
Attorneys for Petitioners.

[Endorsed]: Filed Nov. 3, 1934. [45]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 45, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of Dec., 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7728. United States Circuit Court of Appeals for the Ninth Circuit. Regina Martz and A. J. Martz, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United Statse Board of Tax Appeals.

Filed December 28, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7728.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Regina Martz and A. J. Martz,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONERS.

J. Wiseman Macdonald,
W. W. Wallace,
Chas. F. Hutchins,
Higgins Bldg., 108 W. 2d St., Los Angeles, Cal.
Attorneys for Petitioners.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 7728.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Regina Martz and A. J. Martz,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONERS.

PETITION TO REVIEW DECISION OF THE BOARD OF TAX APPEALS.

There were two cases in the above matter which were consolidated for trial by an order duly made and entered before the Board of Tax Appeals. The matters involved relate to the income tax of each of the petitioners for the calendar year 1928. Petitioners are the son and daughter, respectively, of Elizabeth Martz, who died in Los Angeles, California, on November 30, 1927. Petitioner A. J. Martz was appointed administrator of her estate by the Superior Court of the state of California, in and for the county of Los Angeles.

On May 10, 1928, he paid to the state of California inheritance taxes due from himself and his sister upon

their inheritances in the sum of $427,043.16, one-half of that sum being the inheritance tax due on the inheritance of each of said petitioners.

Thereafter, and on May 12, 1928, a petition for partial distribution in the matter of the estate of Elizabeth Martz was filed, which was heard on May 29, 1928, at which time said petition for partial distribution was granted.

Thereafter, petitioners duly filed their tax returns for the calendar year 1928, wherein each of said petitioners claimed as a deduction from their gross income the sum of $213,521.58, theretofore paid to the state of California as inheritance tax in their mother's estate.

Upon an audit of their income tax returns, the deduction so claimed by each of said petitioners was disallowed and as a result thereof an additional income tax was assessed to petitioner Regina Martz in the sum of $5,496.20, and as to petitioner A. J. Martz in the sum of $14,581.53.

Assignments of Error.

Petitioners assign as error the following acts and omissions of the United States Board of Tax Appeals:

(1) The failure to allow as a deduction from each of the petitioners' gross income for the year 1928 the inheritance taxes paid on May 10, 1928, to the state of California, while the 1926 Revenue Act was still in force and effect.

(2) The failure to find that section 703, Revenue Act of 1928, allows the deduction claimed the distributees of the estate when claimed by them in their return and not claimed by the estate.

Argument of Petitioners.

The Revenue Act of 1926 provides that inheritance taxes paid are deductible only by the person making the payment, to wit: the beneficiary.

The particular question involved herein is:

Should Petitioners Be Allowed to Deduct Inheritance Taxes Accrued and Paid on May 10, 1928, From Their Income Taxes for That Year?

The Revenue Act of 1928 was signed on May 29, 1928, and was by its terms made retroactive to January 21, 1928. The Revenue Act of 1928, section 23 (c), provides that the amounts paid for inheritance taxes shall be allowed as a deduction only to the estate. However, inasmuch as the act was made retroactive, a saving clause was inserted in said act, section 703 (a), Revenue Act of 1928, which reads as follows:

> "In determining the net income of an heir, devisee, legatee, distributee, or beneficiary (hereinafter in this section referred to as 'beneficiary') or of an estate for any taxable year, under the Revenue Act of 1926 or any prior Revenue Act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:
>
> "(1) If the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate;
>
> "(2) If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary;
>
> "(3) If the deduction has been claimed by the estate and also by the beneficiary, it shall be allowed

> to the estate (and not to the beneficiary) if the tax was actually paid by the legal representative of the estate to the taxing authorities of the jurisdiction imposing the tax; and it shall be allowed to the beneficiary (and not to the estate) if the tax was actually paid by the beneficiary to such taxing authorities."

Petitioners claim that this clause governs the situation in this case. Petitioners paid the inheritance tax at a time when the 1926 Act was in effect. Therefore, under section 703, *supra,* if the deduction was claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary.

Petitioners, as beneficiaries, claimed the deduction, and the estate of Elizabeth Martz did not. Therefore, we submit that the petitioners have brought themselves squarely within this section.

In making the act retroactive to 1928, it would appear that Congress did not intend to penalize a citizen who had complied with the law in existence at the time in question, and before the 1928 Act took effect. It would certainly be unjust to hold that the citizen who complied with the law as it existed would not be entitled to a benefit placed in the law by Congress which intended to give the citizen the benefit of his act in compliance with the existing laws.

It may be said parenthetically that, in this case, the tax was paid before the retroacting statute was enacted and *not after*, and a statute controlling the situation was actually in existence when the payment was made. The payment was squarely made under that statute, and a corresponding right to deduct the tax payment from income tax liability had been thereupon at once established.

Public policy certainly frowns upon a condition in which one law renders inoperative something actually done under an antecedent law, and by which a right is created.

In the case of *Bankers Trust Co. v. Bowers*, 295 Fed. 89, the court said:

> "In interpreting a statute the construction placed thereon should avoid unjust consequences unless language compelled such a result, and a construction should be had with reference both to the history of the legislation and to other sections of the law with which it is then *para materia*."

The Supreme Court has also expressed the view that a reasonable interpretation of a statute should be adopted rather than one which would produce an inequality or injustice.

In *Knowlton v. Moore*, 178 U. S. 41 (44 L. Ed. 969, at p. 984), the court said:

> "Where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Laws Respecting Taxes Are Construed in Favor of the Taxpayer.

If there be any doubt as to the meaning of language used in a statute levying tax the doubt must be resolved in favor of the taxpayer.

In the case of *Gould v. Gould*, 245 U. S. 15, 62 L. Ed. 211, the court said on page 213:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by

> implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

In the case of *U. S. v. Merriam,* 263 U. S. 179, 68 L. Ed. 240, the court said, page 244:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

The 1926 Revenue Act provided that the heir or beneficiary was the only person who could take a deduction from his or her income tax for inheritance taxes paid to this state.

Section 214 (a), (3) Revenue Act of 1926, and article 131, regulations 69, provide that inheritance taxes paid to a state or territory are deducted by the persons upon whom the tax is imposed, and in the state of California the said inheritance taxes are imposed upon the right or privilege to receive or to succeed to the property passing in the estate.

Most certainly Congress did not intend to make the provisions of the 1928 Act retroactive and thus deny to taxpayers, who had complied with all of the provisions of the then existing law and regulations, the right to a legal deduction theretofore granted and relied upon by the taxpayer in paying his taxes under said laws and regulations. It is contended herein that section 703 clearly applies in this case and allows the deduction to the heir paying the tax and claiming the deduction as was done in this case. If it were otherwise such interpretation would amount to the taking of property or the confiscation of money without due process of law. Any other interpretation would also make that portion of section 703 herein referred to meaningless, and Congress did not pass this part of the law without some purpose. The deduction was clearly within the exception provided by said section, and therefore should have been allowed.

In brief summary, permit us to say that:

This whole matter is very simple.

As in every case of the application of a law, fairness and equity should prevail in interpretation.

The authorities universally declare that if there be any reasonable doubt in the application of a law imposing taxes, the benefit should be given to the taxee.

In the instant case, $427,043.16 was paid for the beneficiaries by the estate administrator as tax to the California inheritance tax authorities. In other words, the money paid was the beneficiaries' money.

What was that money paid for?

It was paid as a tax imposed upon the property of, and owned by, and distributed to, the petitioners.

It was paid just as *all other* taxes are paid, by these petitioners, and by everybody else—paid to a governing body in satisfaction of its taxable right in the properties concerned.

On that very same property on which the petitioners paid the large sum of money in taxes just referred to, the same parties are today paying annual taxes in large sums, part of which taxes goes to the city of Los Angeles, part to the county of Los Angeles, and part to the state of California.

No question can be raised as to the right of these petitioners to deduct from income tax liability the annual taxes so paid on this same real property.

Why should objection be raised to the payment made by these same parties to the state of California in inheritance tax upon the identical property?

One of the two sets of taxes just referred to is paid annually. The other tax, which we are herein discussing, was paid at one time, and for a very large amount.

The principle is the same, however.

Here is a case where the country is dealing with its citizens. The country stands in the light of father. The father is supposed to be just to the children, and fair.

Splitting hairs is not befitting the dignity of either a great country or great tribunals.

The common-sense situation here is that the two beneficiaries have paid an enormous sum of money to the state of California for inheritance tax.

They now pay large sums of money *on the same property* every year—and are allowed such payments in their income tax returns.

Why are they not allowable in their income tax returns for the tax paid to the state as inheritance duty?

If the correct answer to the foregoing inquiry is that the law plainly and unequivocally ordains it, and that law is constitutional—the answer is sufficient, of course.

But where the law effective at the time of the tax payment to California declared that such payment entitled the payor to income tax deduction, and later a so-called retroactive statute conflicted with the then existing law, I contend that the doubt before referred to arises and the benefit should be given to petitioners herein.

Every constituent factor in common sense and fairness declares the foregoing to be true.

At the time this money was paid, May 10, 1928, the law (and only law)—that of 1926—was that the petitioners herein named could deduct the amount paid by them as state inheritance tax in making up their income tax return. And they paid on that basis. They paid an enormous sum—we know not at what difficulty.

That was the law, plain and unqualified, with no cloud on the horizon, or anything suggested to the contrary.

The petitioners complied with the law.

The very minute they complied with the law by paying that tax, they had the right to deduct from their income tax return the money so paid.

Such was the fixed condition at that time.

Later, on May 29, 1928, Congress enacted a new statute by the terms of which the estate was the party to deduct the inheritance tax so paid, but, in said act, which was made retroactive by its terms to January 1, 1928, a saving clause was inserted which provided, among other things, that:

> "If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary."

At the time that petitioners paid their tax to California, the 1928 Revenue Act had not been enacted, and the Statute of 1926 was in full force and operation.

At the very most, in favor of the government it may be said that there is a doubt as to whether, when an act has been lawfully done and a credit under law established (as was the case when the petitioners paid their California state inheritance tax), a later statute may constitutionally take away the full benefit from the parties who had complied with the law at the time.

Again we say that where there is a doubt, the doubt must be resolved in favor of the taxpayer.

The mere fact that the 1928 Revenue Act was made retroactive and purported to repeal the 1926 Act, could not

in fact change the effect of the 1926 Act prior to May 29, 1928, and to compliances with that 1926 law theretofore effected.

There is no question that the Revenue Act of 1926 was in effect (and the only law) at the time the petitioners paid their California state inheritance tax, and that the very moment they paid that tax they were entitled to corresponding reduction from the federal government in their income tax.

It is entirely against public policy for a sovereign state by one law to annul a pre-existing law and take away a right accrued under it.

When a taxpayer pays his tax, two things occur: One in the nature of a penalty, by being compelled to make the payment; the other in the nature of an advantage through the payment being made.

When the petitioners paid their enormous tax to the state of California, these same two conditions arose:

First, there was the penalty in having to pay the amounts. Petitioners paid those amounts, and satisfied the penalty.

Second, there was the compensation (trifling as it is) due *to* petitioners for having so paid.

The compensation was the right to deduct the amounts so paid from income tax.

With all the doubts in this matter, and with all the equities and fairness, it should not be held that the right

to compensation was taken away from petitioners after they had satisfied the demands of California and paid their tax, and had done the same with the expectation, and then knowledge, that they were to receive the slight compensating advantage of being able to deduct the amount so paid from their income tax liability.

We respectfully represent that the present case clearly shows that the petitioners are entitled to such deduction.

Respectfully submitted,

J. Wiseman Macdonald,
W. W. Wallace,
Chas. F. Hutchins,
Attorneys for Petitioners.

No. 7734

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE PROCTOR SHOP, INC.,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—2-5-35

No. 7734

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:
W. W. SPALDING, Esq.,
ROSCOE C. NELSON, Esq.
For Respondent:
W. F. WATTLES, Esq.

Docket No. 58909

THE PROCTOR SHOP, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES:

1931

June 10—Petition received and filed. Taxpayer notified. (Fee paid)

June 10—Copy of petition served on General Counsel.

July 17—Answer filed by General Counsel.

July 27—Copy served—assigned General Calendar.

1933

Feb. 3—Hearing set March 7, 1933.

Feb. 15—Motion for circuit hearing at Portland, Oregon filed by taxpayer. 2/17/33 granted.

Aug. 5—Hearing set 9/25/33 at Portland, Oregon.

Sept. 20—Application for subpoena of M. H. Holtz filed by General Counsel (subpoena duces tecum).

1933

Sept. 20—Subpoena issued.

Sept. 28—Hearing had before Mr. Arundell—submitted. Consolidated with 66268. Briefs due Nov. 10, 1933—without exchange.

Oct. 20—Transcript of hearing of 9/28/33 filed.

Nov. 8—Brief filed by taxpayer.

Nov. 8—Motion for extension to Dec. 20, 1933 to file proposed findings of fact and brief filed by General Counsel. 11/9/33 granted.

Dec. 20—Brief filed by General Counsel.

1934

Jan. 30—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 1/31/34 granted.

Feb. 15—Motion for leave to file a reply brief, brief tendered, filed by General Counsel. 2/20/34 granted.

May 16—Findings of fact and opinion rendered—C. R. Arundell, Division 7. Decision will be entered under Rule 50.

June 15—Notice of settlement filed by General Counsel.

June 18—Hearing set July 11, 1934 under Rule 50.

July 3—Consent to settlement filed by taxpayer.

July 11—Decision entered—Division 7.

Oct. 5—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Oct. 16—Proof of service filed.

Dec. 4—Motion for extension to 2/5/35 to complete record filed by General Counsel.

1934

Dec. 4—Order enlarging time to 2/5/35 to prepare evidence and deliver record entered.

Dec. 13—Agreed praecipe filed—proof of service thereon. [1*]

United States Board of Tax Appeals

Docket No. 58909

THE PROCTOR SHOP, INCORPORATED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-3-JAH-60D) dated April 30, 1931, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with its principal office at 331 Washington Street, Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on April 30, 1931.

3. The taxes in controversy are income taxes for [2] the fiscal year ended January 31, 1929 and for $3,878.99, all of which is in dispute.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The net income for the taxable year is overstated by $17,327.36, representing the statutory net loss sustained by petitioner in that amount for its previous taxable year ended January 31, 1928, which respondent has erroneously disallowed as hereinafter outlined.

(b) The net income for the taxable year is further overstated by $19,930.25, representing deductions claimed for that year and erroneously disallowed by respondent, as hereinafter stated.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner was organized and incorporated under the laws of the State of Oregon on October 6, 1927, after having purchased the assets of Proctor's Incor- [3] porated, as of September 30, 1927. Petitioner established a fiscal year ended January 31st and its accounts have been kept and its income tax returns rendered on that basis since its organization in October, 1927.

For its first taxable year ended January 31, 1928, petitioner's books and tax return showed an operating and statutory net loss of $17,822.84, which amount was carried forward and deducted on petitioner's return for the fiscal year ended January 31, 1929. The respondent has converted this net loss for 1928 into a so-called net income of $1,648.16 by disallowing the following deductions claimed by petitioner:

Net loss reported by petitioner		$17,822.84
Additions by respondent:		
1. Reserves for bad debts disallowed	$12,995.52	
2. Interest disallowed	1,980.00	
3. Officer's salary disallowed	4,000.00	
4. Organization expenses	495.48	19,471.00
Net income shown by respondent—		$ 1,648.16

With the exception of the item of organization expenses ($495.48) the foregoing adjustments are erroneous for the following reasons: [4]

1. Among the assets purchased by petitioner from Proctor's, Incorporated, were accounts receivable amounting to $124,686.36. At the end of its first fiscal year, January 31, 1928, petitioner adopted the method of setting up a reserve for bad debts to cover the estimated accounts that were uncollectible. Specifically, petitioner listed at the close of its fiscal year all accounts on which no collection had been made within the preceding four months and increased the reserve by $18,421.13 to cover the amount of such accounts which the petitioner believed would be uncollectible. The respondent has reduced the provision at January 31, 1928, to $5,425.61 by arbitrarily computing the reserve on a basis of 2¾% of sales. The petitioner, on information and belief based on its actual experience, alleges that the addition to reserve for bad debts of $18,421.13 at January 31, 1928, is no more than a reasonable addition to the reserve and that the

amount allowed by respondent is wholly insufficient to take care of the bad debts.

2. When the petitioner was organized it issued $1.000 in common stock and $99.000 was loaned to it by Aaron Holtz, to whom Debenture Preference Stock was issued in that [5] amount. The certificate evidencing this so-called stock specifically specified that 6% interest per annum was to be paid to Mr. Holtz on the $99.000 secured from him, said interest to be payable quarterly before any dividends were paid on the common stock. The petitioner has at all times considered this $99.000 as being a loan to it and has consistently since its organization credited Mr. Holtz on its books monthly with interest at 6% on this amount of indebtedness and deducted same as an expense. The amount of such interest accrued on its books and paid to Mr. Holtz during the taxable period ended January 31, 1928 amounted to $1.980. This amount which was in turn deducted on the tax return was allowed as a deduction by the examining revenue agent but respondent has disallowed said deduction on the erroneous assumption that it represented a dividend.

3. During the taxable year ended January 31, 1928, the petitioner agreed to and did pay M. H. Holtz, its President and General Manager, a salary of $2,500 per month for his services. Pursuant to this agreement there was credited on petitioner's books to said M. H. Holtz the sum of $2,500 monthly [6] for each of the four months October to January, comprising the taxable year ended January 31, 1928, or a total of $10.000. This amount ($10,000) was

paid solely for services rendered by Mr. Holtz, who devoted all his time to petitioner's business. It bears no relation to the stock owned by him and is no more than reasonable compensation for the services actually performed. Notwithstanding these facts, respondent has arbitrarily reduced this compensation by $4,000.

When the aforesaid three items, $12,995.52 reserves for debts, $1,980 interest paid on indebtedness, and $4,000 salary, disallowed as deductions by respondent, have been restored as deductions, there will be an operating statutory net loss of $17,327.36 for the taxable period ended January 31, 1928, which is properly allowable as a deduction for the succeeding taxable year here involved, viz., the year ended January 31, 1929.

(b) In addition to the net loss sustained for the taxable year ended January 31, 1928, as above outlined, which was disallowed as a deduction, the respondent further increased the net income for the taxable year ended January 31, 1929 by disallowing the following deductions taken on the return: [7]

1. Interest disallowed	$ 5,940.00
2. Officer's salary disallowed	12,000.00
3. Reserves for bad debts disallowed	1,990.25
	$19,930.25

1. During the taxable year ended January 31, 1929, petitioner credited on its books interest in the amount of $5,940 to the account of Aaron Holtz and charged the same to interest. This amount represents 6% on the $99,000 described in paragraph

5(a) (2) above. Said interest was credited monthly and was included in the income tax return rendered by said Aaron Holtz as interest received by him. For the reasons stated in said paragraph 5(a) (2) above, petitioner claims that respondent erred in disallowing this deduction and in treating it as a dividend.

2. During the taxable year ended January 31, 1929, petitioner paid to M. H. Holtz, its President and General Manager, a salary of $2,500 per month, a total of $30,000 for services rendered. This amount was paid to Mr. Holtz in accordance with an agreement entered into with him when he was employed by the petitioner in 1927, as stated in paragraph 5(a) (3) above. This amount ($30,000) was paid solely for [8] services rendered by Mr. Holtz. It bears no relation to the stock owned by him and is no more than reasonable compensation for the services actually performed. The respondent has arbitrarily reduced this compensation by $12,000.

3. As stated in paragraph 5(a) (1) above, the petitioner adopted the reserve method of charging off bad debts immediately after its organization in 1927, and has since consistently followed this method. At the end of the taxable year 1928 it added $18,421.13 to this reserve, and at the end of the taxable year 1929 (the year here involved) it added $16,961.42 to this reserve. In arriving at these amounts the petitioner took into consideration only the doubtful accounts on which no payments had been made for a considerable time prior to the

date of the close of the taxable year. Based upon the experience of petitioner it is believed that the amount of $16,961.42 added to the bad debt reserve for the year ended January 31, 1929, is reasonable and no more than sufficient to cover the uncollectible accounts. The respondent has reduced this amount by $1,990.25 by arbitrarily fixing the reserve on the basis of 2¾% of sales.

WHEREFORE, petitioner prays that this Board may hear the proceeding; that it be held by the Board that the [9] errors above mentioned were made by respondent; and for such other relief as may appear equitable and proper as this cause progresses.

W. W. SPALDING,
Counsel for Petitioner,
1021 Tower Building,
Washington, D. C.

State of Oregon,
County of Multnomah—ss.

MERRIMAN H. HOLTZ, being duly sworn, says that he is President of The Proctor Shop, Inc., the petitioner herein, and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

MERRIMAN H. HOLTZ [10]

Subscribed and sworn to before me this 4 day of June, 1931.

[Notarial Seal] E. E. DUNBAR,
Notary Public.

My commission expires Apr. 23, 1934. [11]

EXHIBIT "A"

COPY

TREASURY DEPARTMENT
Washington

Apr. 30, 1931.

The Proctor Shop, Incorporated,
331 Washington Street,
Portland, Oregon.

Sirs:

You are advised that the determination of your tax liability for the fiscal year ended January 31, 1929 discloses a deficiency of $3,878.99, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C.,

for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner,
By (Signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870. [12]

STATEMENT

IT:AR:E-3
JAH-60D

In re: The Proctor Shop, Incorporated,
331 Washington Street,
Portland, Oregon.

TAX LIABILITY

Fiscal Year Ended	Tax Liability	Tax Assessed	Deficiency
January 31, 1928	$ None	$ None	$ None
January 31, 1929	3,878.99	None	3,878.99
Total	$3,878.99	None	$3,878.99

Reference is made to the reports dated July 17, 1930 and February 11, 1931 of the internal revenue agent in charge, Seattle, Washington, to your protest submitted under date of August 19, 1930 and conference held in the agent's office in Portland, Oregon, on October 17, 1930 and January 26, 1931.

As a result of your protest and conference at Portland on January 26, above referred to, certain adjustments were made to your net income resulting in the deficiency of $3,988.54 as shown in the agent's report dated July 17, 1930 being reduced to $3,131.58, and you have evidenced your acquiescence in these adjustments by submitting a signed agreement Form 870.

Careful consideration has been accorded your protest in connection with the agent's findings and the reports on the conferences.

The adjustments recommended by the agent in his report of February 11, 1931 as a result of the conference held on January 26, 1931 have been approved with one exception.

Your contention that the so-called debenture preference certificates of the corporation issued to Aaron Holtz were in fact an ordinary obligation of the corporation to the extent of the face value thereof, and that the 6% per annum paid thereon was interest and not a distribution of the earnings of the corporation, cannot be conceded.

It would appear that if only the wording of the stock certificate be considered that the certificate has the nature of an ordinary obligation. It is believed,

however, that the rights granted the certificate holders as evidenced by the by-laws of the [13] company places them in the position of stockholders, as they may exercise certain rights not ordinarily granted a mere creditor of a company.

The evidence presented indicates that the rights of the certificate holder in this case, Mr. Aaron Holtz, are superior to the rights ordinarily granted the holder of cumulative preferred stock; that he exercised all the rights of an ordinary stockholder in the company and that his contribution to the corporation consisted of an investment in the capital stock thereof and was therefore not a loan.

All of the conditions surrounding the existence of borrowed money should be present before the Bureau allows a deduction for interest paid or accrued thereon. Those conditions are not fully present in this case and while it may have been the original intention to issue the stock for the return of a loan, it is quite evident that the so-called creditor who owned the debenture preference stock did not enforce his claims against the corporation as a creditor ordinarily would under the circumstances. He acted more in the capacity of a stockholder.

It is therefore the opinion of this office, after a careful consideration of the data submitted and cases cited, that the debenture preference stock involved represents capital and not borrowed money and that the annual payments in connection therewith are payments of dividends.

Fiscal Year ended January 31, 1928

Net loss reported on return		$17,822.84
Additional income:		
1. Excesive reserve for bad debts	$12,995.52	
2. Dividends	1,980.00	
3. Organization expense	495.48	
4. Excessive officers salaries	4,000.00	19,471.00
Net income as adjusted		$ 1,648.16

Explanation of Adjustments

1. The addition to the reserve for bad debts as claimed is held to be excessive. The allowable deduction therefor has [14] been computed on the basis of 2¾% of sales, which is considered a reasonable addition, as follows:

Addition to reserve claimed	$18,421.13
Amount allowed	5,425.61
Amount disallowed	$12,995.52

Article 191, Regulations 74.

2. Dividends paid by a domestic corporation do not represent an ordinary or necessary expense of doing business as defined in section 23(a) of the Revenue Act of 1928 and accordingly the amount deducted as such has been disallowed.

3. Expenses incident to the organization of a corporation are held to be capital expenses not deductible in determining the corporation's net taxable income. Article 282, Regulations 74.

4. The salary disallowed represents salary paid to M. H. Holtz for the period in excess of an amount which this office considers fair and reasonable; salary has been allowed Mr. Holtz on the basis of $1,500.00 per month as follows:

Amount claimed	$10,000.00
Amount allowed	6,000.00
Amount disallowed	$ 4,000.00

See section 23(a) of the Revenue Act of 1928.

Computation of Tax

Net income		$ 1,648.16
Less:		
Exemption (1928—$2,000.00		
1929— 3,000.00)		2,000.00
Balance subject to tax		None
Tax assessed		None

[15]

Fiscal year ended January 31, 1929

Net loss reported on return		$ 5,202.06
Additional income:		
1. 1928 loss	$17,822.84	
2. Dividends	5,940.00	
3. Excessive officers' salaries	12,000.00	
4. Excessive reserve for bad debts	1,990.25	37,753.09
Net income as adjusted		$32,551.03

Explanation of Adjustments

1. This amount, representing a statutory loss for 1928, was claimed as a deduction under the provisions of section 117 of the Revenue Act of 1928. A final audit disclosed a net income for 1928; therefore, the amount has been restored to income.

2. See explanation #2 of adjustments to income for 1928.

3. The salary disallowed represents salary paid to M. H. Holtz for the year involved in excess of an amount which this office considers fair and reasonable. Salary has been allowed Mr. Holtz on the basis of $1,500.00 per month as follows:

Amount claimed	$30,000.00
Amount allowed	18,000.00
Amount disallowed	$12,000.00

See section 23(a) of the Revenue Act of 1928.

4. Addition to reserve claimed	$16,961.42
Amount allowed	14,971.17
Amount disallowed	$ 1,990.25

See also explanation #1 of adjustments to income for 1928. [16]

Computation of Tax

Net income	$32,551.03
Less: Exemption	None
Amount taxable at 12% and 11%	$32,551.03
Tax on $32,551.03 at 12%	$ 3,906.12
Tax on 32,551.03 at 11%	3,580.61
Tax applicable to 1928—	
11/12 of $3,906.12	$ 3,580.61
Tax applicable to 1929—	
1/12 of $3,580.61	298.38
Total tax assessable	$ 3,878.99
Tax previously assessed	None
DEFICIENCY	$ 3,878.99

[Endorsed]: Filed Jun. 10, 1931. [17]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4(a), (b). Denies the assignments of error contained in paragraph 4, subdivisions (a) and (b) of the petition.

5(a), (b). Denies the allegations contained in paragraph 5, subdivisions (a) and (b) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
Byron M. Coon,
R. H. Transue,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: Jul. 17, 1931. [18]

[Title of Court and Cause.]

Docket Nos. 58909, 66268.
Promulgated May 16, 1934.

FINDINGS OF FACT AND OPINION.

1. Petitioner issued so-called "debenture preference stock" which is determined to be evidence of indebtedness rather than stock, and the payments made thereon at the rate of 6

percent per annum are held to be deductible as interest paid.

2. The evidence establishes that amounts equal to 2¾ percent of gross sales allowed by respondent as additions to reserve for bad debts are insufficient to cover actual bad debts, and that additions equal to 4 percent of gross sales as claimed by petitioner represent reasonable additions to the reserve.

Roscoe C. Nelson, Esq., for the petitioner.

Warren F. Wattles, Esq., for the respondent.

These proceedings, duly consolidated for hearing, involve deficiencies in income tax for the fiscal years ended January 31, 1929 and 1930, in the respective amounts of $3,878.99 and $681.74. A salary question raised by the pleadings was abandoned by petitioner at the hearing, leaving for determination the question of the amounts deductible as additions to a reserve for bad debts for the period ended January 31, 1928, and the fiscal year ended January 31, 1929, and whether amounts accrued and deducted as interest were allowable as such or constituted dividends on preferred stock. No deficiency has been asserted for the period ended January 31, 1928, but it is involved here by reason of the fact that petitioner claims to have sustained a net loss for that period which is carried over and used as a deduction for the succeeding year.

FINDINGS OF FACT.

Petitioner is an Oregon corporation organized on October 6, 1927. Upon its organization it pur-

chased the assets of an existing business known as Proctor's, Incorporated, which was engaged in selling ready to wear women's apparel on the installment basis. Petitioner took over the assets and business as of October 1, 1927, and continued to conduct the business on the installment basis. [19]

Prior to the organization of petitioner several conferences were held between M. H. Holtz, who became president of petitioner, his father, Aaron Holtz, and the attorney for the petitioner on the question of financing the new enterprise. Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept stock because he desired to be assured that his advances would be repaid, and he also wanted a definite income from the funds. It was deemed inadvisable to issue bonds to cover the loans, as that would affect the credit of the corporation. It was finally decided by the attorney for the petitioner to have the new corporation issue a form of "debenture preference stock" to Aaron Holtz as evidence of the amounts advanced by him. The conclusions of the attorney were set forth in a letter to M. H. Holtz, reading in part as follows:

> I have, therefore, reached the conclusion that the best solution would be to create a form of obligation, which we will call for want of a better name, "debenture preference stock." While the certificates will be called "stock", you will understand that it is not stock in any real sense. Labels are of little significance. A

mortgage, for instance, remains a mortgage even though it may be in the form of a deed. The advantage of calling it "stock" is that in your statements to banks and mercantile agencies you need not list it as a liability, because, under the plan I am suggesting, while it will represent a liability as between the corporation and Aaron Holtz, it will not be a liability insofar as concerns the banks and mercantile creditors, because I understand from my talk with him that Aaron Holtz is willing that the banks and mercantile creditors, in the event of insolvency or liquidation take precedence over him. He in turn will take precedence over stockholders.

The so-called "stock certificates" will provide definitely for the payment of interest whether profits are earned or not, so that except for the fact that Aaron Holtz waives his right to share with other creditors until they have been paid, he will be entitled to a definite interest return, and the failure to pay this interest will place him in position to sue the corporation for the principal amount represented by the certificates. As a stockholder, of course, he would have no such right.

Petitioner's articles of incorporation filed with the corporation department of the State of Oregon on October 6, 1927, state that the authorized capital stock consists of 10 shares of common stock of the

par value of $100 each, and 990 shares of preferred stock of the par value of $100 each. The preference, rights, privileges, and restrictions on each class of stock are described as follows in the articles of incorporation:

> The capital stock of this corporation shall be $100,000.00 divided into the following classifications:
>
> (a) Debenture preference stock of which there shall be 990 (nine hundred and ninety) shares of the par value of $100.00 (One Hundred Dollars) each, aggregating $99,000.00; and
>
> (b) Common stock of which there shall be 10 (ten) shares of the par value of $100.00 (One Hundred Dollars) each, aggregating $1,000.00. [20]
>
> Said debenture preference stock shall be entitled to cumulative interest at the rate of six per cent per annum, payable quarterly, commencing October 1, 1927, before any dividends are paid on the common stock, and the common stock is entitled to all dividends in excess of said six per cent. In the event of the dissolution of the corporation or distribution of its assets, the debenture preference stock outstanding at that time shall first be paid at par, plus all accumulated unpaid interest, and the remainder of the corporate assets shall be divided ratably among the holders of the common stock. The voting power at any stockholders' meeting shall be confined exclusively

to holders of common stock. The corporation shall reserve the right to redeem any number or all of the certificates of debenture preference stock at par plus accumulated interest at any time after December 1, 1927. The said corporation shall be bound to redeem monthly, beginning December 1, 1927, debenture preference stock of the par value of $1500.00 (Fifteen Hundred Dollars) as a minimum. Such retirement, unless same be incidental to liquidation, shall follow the certificates in numerical order. In the event of the issuance of new certificates upon surrender of original certificates, such new certificates shall take the place of those originally issued insofar as the order of redemption is concerned. Failure of said corporation for a period of two years to pay any quarterly interest hereon, as same becomes due and payable, shall render the corporation in default as to such payment and entitle the owners of certificates as to which delinquency occurs, to declare the principal amount of such certificates due and to institute action against the corporation for the par value of said certificates and the accumulated interest thereon. The rights of the holders of debenture preference stock shall, however, be limited in the following respect: In the payment of their several claims all general creditors shall rank superior to the holders of debenture preference stock, but all holders of debenture preference stock shall rank pari passu with each other and supe-

rior to holders of any other class of stock of the corporation.

Upon incorporation 990 shares of the stock described as debenture preference stock were issued to Aaron Holtz. The stock certificates for such stock contained on the face of them the provisions above quoted from the articles of incorporation.

In its annual report to the state corporation department for the year ended January 31, 1928, petitioner reported its authorized capital stock to consist of 10 shares of common stock and 990 shares of debenture preference stock, each of the par value of $100 per share.

Amounts representing 6 percent per annum on the amount of $99,000 were paid by petitioner to Aaron Holtz, and accrued on its books for the period ended January 31, 1928, and the fiscal years ended January 31, 1929 and 1930. The amounts so paid and accrued have been claimed as interest deductions by petitioner and have been disallowed as deductions by the respondent.

Among the assets which petitioner acquired at October 1, 1927, from its predecessor were accounts receivable which aggregated $124,686.36. At that time it was determined that at least 12½ percent of such receivables were worthless and petitioner was allowed [21] a discount equal to that percentage amounting to $15,585.79, the result of which was that petitioner paid $109,100.57 for the accounts In making its opening entries petitioner entered the accounts receivable at the face amount of $124,-686.36 and credited the discount of $15,585.79 to a

reserve for bad debts. Petitioner established a fiscal year basis ending January 31 for filing its income tax returns.

Throughout the years here involved petitioner followed the practice of charging against its reserves for bad debts the amount of those accounts ascertained to be worthless, and crediting to the reserve an amount equal to the total of those accounts upon which no payments had been made for four months or more and which it classified as doubtful accounts. The figures for the several years are as follows:

	1928	1929	1930
Initial reserve	$15,585.79	$18,369.94	$22,518.55
Bad debts	15,636.98	12,812.81	21,331.71
Balance in reserve	[1] 51.19	5,557.13	1,186.84
Doubtful accounts	18,369.94	22,518.55	21,171.56
Added to reserve	18,421.13	16,961.42	19,984.72

[1] Deficit.

Petitioner's gross sales and the amounts of the additions to reserves for bad debts allowed by the respondent, which additions were based on a percentage of gross sales were as follows:

Period of year ended	Gross sales	Additions allowed	Percent of sales
January 31, 1928	$197,294.79	$5,425.61	2¾
January 31, 1929	544,406.09	14,971.17	2¾
January 31, 1930	515,325.80	25,766.29	5

Amounts of $7,891.79 for the period ended January 31, 1928, and $21,776.24 for the year ended January 31, 1929, which are equal to 4 percent of gross sales for that period and year, respectively, are reasonable additions to petitioner's reserve for bad debts.

OPINION.

ARUNDELL: The first question is whether petitioner's payments to Aaron Holtz of 6 percent on his "debenture preference stock" were payments of dividends or interest. Petitioner claims that the real relation between it and Holtz was that of debtor and creditor and the annual sums paid are deductible as interest on borrowed money. [22]

This question has been presented a number of times to the Board and the courts under slightly varying facts. In some cases the so-called stock was to be retired at a fixed date, Arthur R. Jones Syndicate, 5 B. T. A. 853; reversed, 23 Fed. (2d) 833, and in others at the option of the corporation or the stockholder, Finance & Investment Corp., 19 B. T. A. 643; affd., 57 Fed. (2d) 444. In some cases the interest or dividends were payable regardless of earnings, Wiggin Terminals, Inc. v. United States, 36 Fed. (2d) 893, and in others payments were to be made only out of surplus or profits, Kentucky River Coal Corp. v. Lucas, 51 Fed. (2d) 586, sustaining 3 B. T. A. 644; Badger Lumber Co., 23 B. T. A. 362; Elko Lamoille Power Co., 21 B. T. A. 291; affd., 50 Fed. (2d) 595. None of the decided cases lay down any comprehensive

rule by which the question presented may be decided in all cases, and "the decision in each case turns upon the facts of that case." Nowland Realty Co. v. Commissioner, 47 Fed. (2d) 1018; affirming 18 B. T. A. 405; Arthur R. Jones Syndicate, supra; Garden Homes Co. v. Commissioner, 64 Fed. (2d) 593, 598. In each case it must be determined whether the real transaction was that of an investment in the corporation or a loan to it. On this the designation of the instrument issued by the corporation, while not to be ignored, is not conclusive, I. Unterberg & Co., 2 B. T. A. 274. The real intention of the parties is to be sought and in order to establish it evidence aliunde the contract is admissible. Arthur R. Jones Syndicate, supra. If the evidence establishes "that dividends paid are, according to the intent of the parties, in fact interest, and the stock on which the dividends are paid is merely held by the creditor as security, it makes no difference what the reason was for paying in that form." Wiggin Terminals, Inc. v. United States, supra.

In the present case it was obviously the intent of the interested parties that the $99,000 advanced by Aaron Holtz to the petitioner corporation was to be regarded as a loan. The uncontradicted evidence is that Holtz did not want to stand in the relation of a stockholder of the corporation. He wanted a definite income from the money advanced and assurance that he would be repaid. The only reason for not openly treating the $99,000 as a

loan was to aid the corporation in obtaining a credit rating. The lender was not restricted to corporate earnings for the return on his advances, and upon default for two years had a right of action against the corporation for both principal and interest. It is our opinion that in reality the relation of Aaron Holtz to the petitioner corporation was that of creditor rather than stockholder. Consequently, the sums representing 6 percent upon his loans are interest and deductible by the petitioner. [23]

The issue on the reserve for bad debts covers the period ended January 31, 1928, and the fiscal year ended January 31, 1929. The fiscal year ended January 31, 1930, is not involved under this issue, although evidence pertaining to that year was introduced.

The amounts claimed by petitioner in its returns for the periods under review, the amounts allowed by the respondent, and the amounts now claimed by petitioner as reasonable additions to the reserve for bad debts are as follows:

	January 31 1928	January 31 1929
Originally claimed	$18,421.13	$16,961.42
Allowed	5,425.61	14,971.17
Presently claimed	7,891.79	21,776.24

The amounts now claimed represent 4 percent of gross sales, and the amounts allowed by respondent are 2¾ percent of gross sales.

As set out in the findings of fact, the practice of petitioner was to credit to the bad debt reserve an

amount equal to the total of accounts which were delinquent for four months. Against the reserve was charged the actual bad debts. The actual bad debts for the period ended January 31, 1928, were $15,636.98 and for the fiscal year ended January 31, 1929, they were $12,812.81, a total of $28,449.79, against total additions to reserves now claimed in the amount of $29,668.03, and $20,396.78 allowed by the respondent. These figures demonstrate that the additions allowed by the respondent were insufficient to care for bad debts and also establish that the amounts now claimed by petitioner are not unreasonable additions. In our opinion the amounts now claimed by petitioner should be allowed as deductions of reasonable additions to its reserve for bad debts.

At the trial of these proceedings a question arose as to the effect of setting up an initial reserve for bad debts in the amount of $15,585.79 representing 12½ percent of the accounts receivable purchased by petitioner from its predecessor. The evidence develops that the amount so credited to the reserve account has not been charged to earnings or surplus, nor has a deduction ever been claimed in respect of it in petitioner's income tax returns. Petitioner does not now claim any deduction on account of the $15,585.79 credited to the reserve at the opening of its books, but claims deductions for additions thereto in amounts representing 4 percent of its sales, which we have held above are allowable. The initial reserve does not appear to have

any bearing upon the questions presented for decision.

[Seal]

Decision will be entered under Rule 50. [24]

United States Board of Tax Appeals.

Docket No. 58909.

THE PROCTOR SHOP, INCORPORATED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the opinion of the Board promulgated May 16, 1934, the respondent herein on July 3, 1934, having filed a proposed recomputation and the petitioner having filed a notice of acquiescence therein, it is

ORDERED and DECIDED that there is a deficiency for the fiscal year ended January 31, 1929, in the amount of $1,669.28.

Enter:

[Seal] (s) C. ROGERS ARUNDELL,
Member

[Endorsed]: Entered Jul. 11, 1934. [25]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and John D. Kiley, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly qualified and acting Commissioner of Internal Revenue and holding office by virtue of the laws of the United States; that The Proctor Shop, Incorporated, the respondent on review, hereinafter called the respondent, is a corporation organized and existing under and by virtue of the laws of the State of Oregon, engaged in selling ready to wear women's apparel on the installment basis, with its principal place of business at 331 Washington Street, Portland, Oregon; that the income tax return of said corporation for the fiscal year ended [26] January 31, 1929 was filed with the Collector of Internal Revenue for the District of Oregon and that the office of said Collector is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The nature of the controversy is as follows, to-wit:

Respondent is an Oregon corporation organized on October 6, 1927. Upon its organization it purchased the assets of an existing business known as Proctor's, Incorporated, which was engaged in selling ready to wear women's apparel on the installment basis. Respondent took over the assets and business as of October 1, 1927, and continued to conduct the business on the installment basis.

Prior to the organization of respondent several conferences were held between M. H. Holtz, who became president of respondent, his father, Aaron Holtz, and the attorney for the respondent on the question of financing the new enterprise. Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept stock because he desired to be assured that his advances would be repaid, and he also wanted a definite income from the funds. It was deemed inadvisable to issue bonds to cover the loans, as that would affect the credit of the corporation. It was finally decided by the attorney for the respondent to have the new corporation issue a form of "debenture proference stock" to Aaron Holtz as evidence of the amounts advanced by him.

Respondent's articles of incorporation filed with the corporation department of the State of Oregon on October 6, 1927, state that the authorized capital stock consists of 10 shares of common stock of

[27] the par value of $100 each, and 990 shares of preferred stock of the par value of $100 each. Upon incorporation 990 shares of the stock described as "debenture preference stock" were issued to Aaron Holtz.

Amounts representing 6 percent per annum on the amount of $99,000 were paid by respondent to Aaron Holtz, and accrued on its books for the period ended January 31, 1928, and the fiscal year ended January 31, 1929. The amounts so paid and accrued have been claimed as interest deductions by respondent and have been disallowed as deductions by the Commissioner.

The Commissioner determined a deficiency in Federal income tax against the respondent for the fiscal year ended January 31, 1929 in the amount of $3,878.99, and on April 30, 1931 sent to it by registered mail notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928; that thereafter on June 10, 1931 the respondent filed an appeal from said notice of deficiency with the United States Board of Tax Appeals.

On September 28, 1933 the case was submitted to the United States Board of Tax Appeals for its decision. On May 16, 1934 the Board promulgated its opinion and on July 11, 1934 entered its decision and redetermination in accordance with its opinion, wherein and whereby it was ordered and decided that there was a deficiency in tax for the fiscal year ended January 31, 1929 in the amount of $1,669.28.

The Commissioner being aggrieved by the conclusions of law contained in said opinion and by said final decision, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit. [28]

III.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in determining that the sum of $5,940.00 paid during the fiscal year ended January 31, 1929 constituted interest on indebtedness, and as such was deductible from income.

2. The Board of Tax Appeals erred in determining that the so-called "debenture preference stock" of the respondent constituted indebtedness of the taxpayer.

3. The Board of Tax Appeals erred in its failure and refusal to hold that the sum of $5,940.00 paid by the respondent during the fiscal year ended January 31, 1920 constituted the payment of a dividend.

4. The Board of Tax Appeals erred in its failure and refusal to hold that the so-called "debenture preference stock" of the respondent was in fact and in law preferred stock.

5. The Board of Tax Appeals erred in determining that there was a statutory net loss for the fiscal year ended January 31, 1928 in the amount of $2,798.02 deductible from respondent's net in-

come for the fiscal year ended January 31, 1929 in that the Board erred in holding and determining that the sum of $1,980.00 paid during the fiscal year ended January 31, 1928 to Aaron Holtz constituted the payment of interest on indebtedness.

6. The Board of Tax Appeals erred in determining that there was a deficiency in tax for the fiscal year ended January 31, 1929 in the amount of $1,669.28.

7. The Board of Tax Appeals erred in its failure and refusal to determine that there was a deficiency in tax for the fiscal year ended [29] January 31, 1929 in the amount of $3,878.99.

WHEREFORE, he petitions that a transcript of the record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said Court for filing and appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

(Sgd) FRANK J. WIDEMAN,
Assistant Attorney General.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:

John D. Kiley,
Special Attorney,
Bureau of Internal Revenue.

United States of America,
District of Columbia—ss:

JOHN D. KILEY, being duly sworn, says that he is a Special Attorney in the office of the Assistant General Counsel for the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) JOHN D. KILEY.

Sworn and subscribed to before me this 5th day of October, 1934.

[Seal] (Sgd) GEORGE W. KILES,
Notary Public.

My commission expires Nov. 16, 1937.

[Endorsed]: Filed Oct. 5, 1934. [30]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

The Proctor Shop, Incorporated,
331 Washington Street,
Portland, Oregon.

R. C. Nelson, Esq.,
800 Pacific Bldg.,
Portland, Oregon.

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 5th day of October, 1934.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 9th day of October, 1934.

(Sgd) THE PROCTOR SHOP, INC.,
Merriman H. Holtz, Pres.,
Respondent on Review.

(Sgd) ROSCOE C. NELSON,
Attorney for Respondent on Review.

[Endorsed]: Filed Oct. 16, 1934. [31]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.

   (a) Petition, including annexed copy of deficiency letter.

   (b) Answer.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. [Not included in record.] [32]

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Counsel for respondent on review concurs in this praecipe for record.

(Sgd) ROSCOE C. NELSON,
Counsel for Respondent.

Service of a copy of the within praecipe is hereby admitted this 5 day of December, 1934.

(Sgd) ROSCOE C. NELSON,
Counsel for Respondent.

[Endorsed]: Filed Dec. 13, 1934. [33]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 33, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 31st day of December, 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7734. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. The Proctor Shop, Inc., Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 8, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7735

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE PROCTOR SHOP, INC.,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 80—2-11-35

No. 7735

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE PROCTOR SHOP, INC.,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 80—2-11-35

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

W. W. SPALDING, Esq.,
ROSCOE C. NELSON, Esq.

For Respondent:

W. F. WATTLES, Esq.

Docket No. 66268

THE PROCTOR SHOP, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

1932

May 14—Petition received and filed. Taxpayer notified. (Fee paid)

May 16—Copy of petition served on General Counsel.

July 12—Answer filed by General Counsel.

Sept. 2—Copy of answer served on taxpayer—Circuit Calendar.

1933

Aug. 5—Hearing set 9/25/33, Portland, Oregon.

Sept. 20—Application for subpoena duces tecum filed by General Counsel.

Sept. 20—Subpoena duces tecum issued to M. H. Holtz.

1933

Sept. 28—Hearing had before C. R. Arundell, Division 7—submitted. Consolidated with 58909. Briefs due Nov. 10, 1933—without exchange.

Oct. 20—Transcript of hearing 9/28/33 filed.

Nov. 8—Brief filed by taxpayer.

Nov. 8—Motion for extension to Dec. 20, 1933 to file findings of fact and brief filed by General Counsel. 11/9/33 granted.

Dec. 20—Brief filed by General Counsel.

1934

Jan. 30—Motion for leave to file a reply brief, brief tendered, filed by taxpayer. 1/31/34 granted.

Feb. 15—Motion for leave to file a reply brief, brief tendered, filed by General Counsel. 2/20/34 granted.

May 16—Findings of fact and opinion rendered—C. R. Arundell, Division 7. Decision will be entered under Rule 50.

June 15—Notice of settlement filed by General Counsel.

June 18—Hearing set July 11, 1934 under Rule 50.

July 3—Consent to settlement filed by taxpayer.

July 11—Decision entered—C. R. Arundell, Division 7.

Oct. 5—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

Oct. 16—Proof of service filed by General Counsel.

1934

Dec. 4—Motion for extension to Feb. 5, 1935 to complete and transmit record filed by General Counsel.

Dec. 4—Order enlarging time to Feb. 5, 1935 to prepare evidence and deliver record entered.

Dec. 13—Agreed praecipe with proof of service thereon filed by General Counsel. [1*]

United States Board of Tax Appeals

Docket No. 66268

THE PROCTOR SHOP, INCORPORATED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commisioner of Internal Revenue in his notice of deficiency (IT:AR:E-4 FBR-60D) dated March 21, 1932, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with its principal office at 331 Washington Street, Portland, Oregon.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on March 21, 1932.

3. The taxes in controversy are income taxes for the fiscal year ended January 31, 1930, and for $681.74, all of which is in dispute. [2]

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The tax liability asserted on the basis of the revised deficiency for tax year, is over-stated to the extent of $658.35, because of the erroneous disallowance of deductions claimed for the tax year, as hereinafter stated.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner was organized and incorporated under the laws of the State of Oregon on October 6, 1927, after having purchased the assets of Proctor's, Incorporated, as of September 30, 1927. Petitioner established a fiscal year ended January 31st and its accounts have been kept and its income tax returns rendered on that basis since its organization in October, 1927.

When the petitioner was organized it issued $1,000 in common stock and $99,000 was loaned to it by Aaron Holtz, to whom Debenture Preference Stock was issued in that amount. The certificate evidencing this so-called stock specifically specified that 6% interest per annum was to be paid to Mr. Holtz on the $99,000 secured from him, said in- [3]

terest to be payable quarterly before any dividends were paid on the common stock. The petitioner has at all times considered this $99,000 as being a loan to it and has consistently since its organization credited to Mr. Holtz on its books monthly with interest at 6% on this amount of indebtedness and deducted same as an expense. The amount of such interest accrued on its books and paid to Mr. Holtz during the taxable period ended January 31, 1928, amounted to $5,940.00. This amount which was in turn deducted on the tax return was allowed as a deduction by the examining revenue agent but respondent has disallowed said deduction on the erroneous assumption that it represented a dividend.

Said interest was credited monthly and was included in the income tax return rendered by said Aaron Holtz as interest received by him.

WHEREFORE, petitioner prays that this Board may hear the proceeding; that it be held by the Board that the error above mentioned was made by respondent; and for such other relief as may appear equitable and proper as this cause progresses.

ROSCOE C. NELSON,
Counsel for Petitioner,
800 Pacific Building,
Portland, Oregon.
W. W. SPALDING,
Counsel for Petitioner,
Tower Buidling,
Washington, D. C. [4]

STATEMENT.

IT:AR:E-4
FBR-60D

In re: The Proctor Shop, Incorporated,
331 Washington Street,
Portland, Oregon.

Tax Liability

Fiscal Year Ended—January 31, 1930.
Tax Liability—$681.74.
Tax Assessed—None.
Deficiency—$681.74.

The deficiency shown herein is based upon the report dated December 5, 1931, a copy of which was furnished you under date of December 11, 1931, as revised by conference report dated February 2, 1932, furnished you on February 11, 1932, which is made a part of this letter.

Inasmuch as the issue involved for the taxable year ended January 31, 1930, is now under consideration by the United States Board of Tax Appeals for the prior year, it is apparent that nothing could be accomplished by affording you an opportunity to discuss your case before mailing formal notice of final determination as provided by section 272(a) of the Revenue Act of 1928.

[Endorsed]: May 14, 1932. [7]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies the assignments of error contained in paragraph 4.

5. Denies the allegations contained in paragraph 5 and subparagraphs contained thereunder.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue

Of Counsel:

B. N. COON,
F. S. GETTLE,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: July 12, 1932. [8]

[Title of Court and Cause.]

Docket Nos. 58909, 66268.

Promulgated May 16, 1934.

FINDINGS OF FACT AND OPINION.

1. Petitioner issued so-called "debenture preference stock" which is determined to be evidence of indebtedness rather than stock, and the payments made thereon at the rate of 6 percent per annum are held to be deductible as interest paid.

2. The evidence establishes that amounts equal to 2¾ percent of gross sales allowed by respondent as additions to reserve for bad debts are insufficient to cover actual bad debts, and that additions equal to 4 percent of gross sales as claimed by petitioner represent reasonable additions to the reserve.

Roscoe C. Nelson, Esq., for the petitioner.

Warren F. Wattles, Esq., for the respondent.

These proceedings, duly consolidated for hearing, involve deficiencies in income tax for the fiscal years ended January 31, 1929 and 1930, in the respective amounts of $3,878.99 and $681.74. A salary question raised by the pleadings was abandoned by petitioner at the hearing, leaving for determination the question of the amounts deductible as additions to a reserve for bad debts for the period ended January 31, 1928, and the fiscal year ended January 31, 1929, and whether amounts accrued and deducted as interest were allowable

as such or constituted dividends on preferred stock. No deficiency has been asserted for the period ended January 31, 1928, but it is involved here by reason of the fact that petitioner claims to have sustained a net loss for that period which is carried over and used as a deduction for the succeeding year.

FINDINGS OF FACT.

Petitioner is an Oregon corporation organized on October 6, 1927. Upon its organization it purchased the assets of an existing business known as Proctor's, Incorporated, which was engaged in selling ready to wear women's apparel on the installment basis. Petitioner took over the assets and business as of October 1, 1927, and continued to conduct the business on the installment basis. [9]

Prior to the organization of petitioner several conferences were held between M. H. Holtz, who became president of petitioner, his father, Aaron Holtz, and the attorney for the petitioner on the question of financing the new enterprise. Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept stock because he desired to be assured that his advances would be repaid, and he also wanted a definite income from the funds. It was deemed inadvisable to issue bonds to cover the loans, as that would affect the credit of the corporation. It was finally decided by the attorney for the petitioner to have the new corporation issue a form of "debenture preference stock" to Aaron Holtz as evidence

of the amounts advanced by him. The conclusions of the attorney were set forth in a letter to M. H. Holtz, reading in part as follows:

> I have, therefore, reached the conclusion that the best solution would be to create a form of obligation, which we will call for want of a better name, "debenture preference stock." While the certificates will be called "stock", you will understand that it is not stock in any real sense. Labels are of little significance. A mortgage, for instance, remains a mortgage even though it may be in the form of a deed. The advantage of calling it "stock" is that in your statements to banks and mercantile agencies you need not list it as a liability, because, under the plan I am suggesting, while it will represent a liability as between the corporation and Aaron Holtz, it will not be a liability insofar as concerns the banks and mercantile creditors, because I understand from my talk with him that Aaron Holtz is willing that the banks and mercantile creditors, in the event of insolvency or liquidation take precedence over him. He in turn will take precedence over stockholders.
>
> The so-called "stock certificates" will provide definitely for the payment of interest whether profits are earned or not, so that except for the fact that Aaron Holtz waives his right to share with other creditors until they have been paid, he will be entitled to a definite interest

return, and the failure to pay this interest will place him in position to sue the corporation for the principal amount represented by the certificates. As a stockholder, of course, he would have no such right.

Petitioner's articles of incorporation filed with the corporation department of the State of Oregon on October 6, 1927, state that the authorized capital stock consists of 10 shares of common stock of the par value of $100 each, and 990 shares of preferred stock of the par value of $100 each. The preference, rights, privileges, and restrictions on each class of stock are described as follows in the articles of incorporation:

> The capital stock of this corporation shall be $100,000.00 divided into the following classifications:
>
> (a) Debenture preference stock of which there shall be 990 (nine hundred and ninety) shares of the par value of $100.00 (One Hundred Dollars) each, aggregating $99,000.00; and
>
> (b) Common stock of which there shall be 10 (ten) shares of the par value of $100.00 (One Hundred Dollars) each, aggregating $1,000.00. [10]
>
> Said debenture preference stock shall be entitled to cumulative interest at the rate of six per cent per annum, payable quarterly, commencing October 1, 1927, before any dividends are paid on the common stock, and the common stock is entitled to all dividends in excess

of said six per cent. In the event of the dissolution of the corporation or distribution of its assets, the debenture preference stock outstanding at that time shall first be paid at par, plus all accumulated unpaid interest, and the remainder of the corporate assets shall be divided ratably among the holders of the common stock. The voting power at any stockholders' meeting shall be confined exclusively to holders of common stock. The corporation shall reserve the right to redeem any number or all of the certificates of debenture preference stock at par plus accumulated interest at any time after December 1, 1927. The said corporation shall be bound to redeem monthly, beginning December 1, 1927, debenture preference stock of the par value of $1500.00 (Fifteen Hundred Dollars) as a minimum. Such retirement, unless same be incidental to liquidation, shall follow the certificates in numerical order. In the event of the issuance of new certificates upon surrender of original certificates, such new certificates shall take the place of those originally issued insofar as the order of redemption is concerned. Failure of said corporation for a period of two years to pay any quarterly interest hereon, as same becomes due and payable, shall render the corporation in default as to such payment and entitle the owners of certificates as to which delinquency occurs, to declare the principal amount of such certificates due and to institute action against the

> corporation for the par value of said certificates and the accumulated interest thereon. The rights of the holders of debenture preference stock shall, however, be limited in the following respect: In the payment of their several claims all general creditors shall rank superior to the holders of debenture preference stock, but all holders of debenture preference stock shall rank pari passu with each other and superior to holders of any other class of stock of the corporation.

Upon incorporation 990 shares of the stock described as debenture preference stock were issued to Aaron Holtz. The stock certificates for such stock contained on the face of them the provisions above quoted from the articles of incorporation.

In its annual report to the state corporation department for the year ended January 31, 1928, petitioner reported its authorized capital stock to consist of 10 shares of common stock and 990 shares of debenture preference stock, each of the par value of $100 per share.

Amounts representing 6 percent per annum on the amount of $99,000 were paid by petitioner to Aaron Holtz, and accrued on its books for the period ended January 31, 1928, and the fiscal years ended January 31, 1929 and 1930. The amounts so paid and accrued have been claimed as interest deductions by petitioner and have been disallowed as deductions by the respondent.

Among the assets which petitioner acquired at October 1, 1927, from its predecessor were accounts receivable which aggregated $124,686.36. At that time it was determined that at least 12½ percent of such receivables were worthless and petitioner was allowed [11] a discount equal to that percentage amounting to $15,585.79, the result of which was that petitioner paid $109,100.57 for the accounts In making its opening entries petitioner entered the accounts receivable at the face amount of $124,-686.36 and credited the discount of $15,585.79 to a reserve for bad debts. Petitioner established a fiscal year basis ending January 31 for filing its income tax returns.

Throughout the years here involved petitioner followed the practice of charging against its reserves for bad debts the amount of those accounts ascertained to be worthless, and crediting to the reserve an amount equal to the total of those accounts upon which no payments had been made for four months or more and which it classified as doubtful accounts. The figures for the several years are as follows:

	1928	1929	1930
Initial reserve	$15,585.79	$18,369.94	$22,518.55
Bad debts	15,636.98	12,812.81	21,331.71
Balance in reserve	[1] 51.19	5,557.13	1,186.84
Doubtful accounts	18,369.94	22,518.55	21,171.56
Added to reserve	18,421.13	16,961.42	19,984.72

[1] Deficit.

Petitioner's gross sales and the amounts of the additions to reserves for bad debts allowed by the respondent, which additions were based on a percentage of gross sales were as follows:

Period or year ended	Gross sales	Additions allowed	Percent of sales
January 31, 1928	$197,294.79	$5,425.61	2¾
January 31, 1929	544,406.09	14,971.17	2¾
January 31, 1930	515,325.80	25,766.29	5

Amounts of $7,891.79 for the period ended January 31, 1928, and $21,776.24 for the year ended January 31, 1929, which are equal to 4 percent of gross sales for that period and year, respectively, are reasonable additions to petitioner's reserve for bad debts.

OPINION.

ARUNDELL: The first question is whether petitioner's payments to Aaron Holtz of 6 percent on his "debenture preference stock" were payments of dividends or interest. Petitioner claims that the real relation between it and Holtz was that of debtor and creditor and the annual sums paid are deductible as interest on borrowed money. [12]

This question has been presented a number of times to the Board and the courts under slightly varying facts. In some cases the so-called stock was to be retired at a fixed date, Arthur R. Jones Syndicate, 5 B. T. A. 853; reversed, 23 Fed. (2d) 833, and in others at the option of the corporation or the stockholder, Finance & Investment Corp., 19 B. T. A. 643; affd., 57 Fed. (2d) 444. In some

cases the interest or dividends were payable regardless of earnings, Wiggin Terminals, Inc. v. United States, 36 Fed. (2d) 893, and in others payments were to be made only out of surplus or profits. Kentucky River Coal Corp. v. Lucas, 51 Fed. (2d) 586, sustaining 3 B. T. A. 644; Badger Lumber Co., 23 B. T. A. 362; Elko Lamoille Power Co., 21 B. T. A. 291; affd., 50 Fed. (2d) 595. None of the decided cases lay down any comprehensive rule by which the question presented may be decided in all cases, and "the decision in each case turns upon the facts of that case." Nowland Realty Co. v. Commissioner, 47 Fed. (2d) 1018; affirming 18 B. T. A. 405; Arthur R. Jones Syndicate, supra; Garden Homes Co. v. Commissioner, 64 Fed. (2d) 593, 598. In each case it must be determined whether the real transaction was that of an investment in the corporation or a loan to it. On this the designation of the instrument issued by the corporation, while not to be ignored, is not conclusive. I. Unterberg & Co., 2 B. T. A. 274. The real intention of the parties is to be sought and in order to establish it evidence aliunde the contract is admissible. Arthur R. Jones Syndicate, supra. If the evidence establishes "that dividends paid are, according to the intent of the parties, in fact interest, and the stock on which the dividends are paid is merely held by the creditor as security, it makes no difference what the reason was for paying in that form." Wiggin Terminals, Inc. v. United States, supra.

In the present case it was obviously the intent of the interested parties that the $99,000 advanced by Aaron Holtz to the petitioner corporation was to be regarded as a loan. The uncontradicted evidence is that Holtz did not want to stand in the relation of a stockholder to the corporation. He wanted a definite income from the money advanced and assurance that he would be repaid. The only reason for not openly treating the $99,000 as a loan was to aid the corporation in obtaining a credit rating. The lender was not restricted to corporate earnings for the return on his advances, and upon default for two years had a right of action against the corporation for both principal and interest. It is our opinion that in reality the relation of Aaron Holtz to the petitioner corporation was that of creditor rather than stockholder. Consequently, the sums representing 6 percent upon his loans are interest and deductible by the petitioner. [13]

The issue on the reserve for bad debts covers the period ended January 31, 1928, and the fiscal year ended January 31, 1929. The fiscal year ended January 31, 1930, is not involved under this issue, although evidence pertaining to that year was introduced.

The amounts claimed by petitioner in its returns for the periods under review, the amounts allowed by the respondent, and the amounts now claimed by petitioner as reasonable additions to the reserve for bad debts are as follows:

	January 31 1928	January 31 1929
Originally claimed	$18,421.13	$16,961.42
Allowed	5,425.61	14,971.17
Presently claimed	7,891.79	21,776.24

The amounts now claimed represent 4 percent of gross sales, and the amounts allowed by respondent are 2¾ percent of gross sales.

As set out in the findings of fact, the practice of petitioner was to credit to the bad debt reserve an amount equal to the total of accounts which were delinquent for four months. Against the reserve was charged the actual bad debts. The actual bad debts for the period ended January 31, 1928, were $15,636.98 and for the fiscal year ended January 31, 1929, they were $12,812.81, a total of $28,449.79, against total additions to reserves now claimed in the amount of $29,668.03, and $20,396.78 allowed by the respondent. These figures demonstrate that the additions allowed by the respondent were insufficient to care for bad debts and also establish that the amounts now claimed by petitioner are not unreasonable additions. In our opinion the amounts now claimed by petitioner should be allowed as deductions of reasonable additions to its reserve for bad debts.

At the trial of these proceedings a question arose as to the effect of setting up an initial reserve for bad debts in the amount of $15,585.79 representing 12½ percent of the accounts receivable purchased by petitioner from its predecessor. The evidence

develops that the amount so credited to the reserve account has not been charged to earnings or surplus, nor has a deduction ever been claimed in respect of it in petitioner's income tax returns. Petitioner does not now claim any deduction on account of the $15,585.79 credited to the reserve at the opening of its books, but claims deductions for additions thereto in amounts representing 4 percent of its sales, which we have held above are allowable. The initial reserve does not appear to have any bearing upon the questions presented for decision.

Decision will be entered under Rule 50.

[Seal] [14]

United States Board of Tax Appeals

Docket No. 66268

THE PROCTOR SHOP, INCORPORATED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the opinion of the Board promulgated May 16, 1934, the respondent herein on July 3, 1934, having filed a proposed recomputation

and the petitioner having filed a notice of acquiescence therein, it is

ORDERED and DECIDED that there is a deficiency for the fiscal year ended January 31, 1930, in the amount of $23.39.

Enter:

[Seal] (Sgd) C. ROGERS ARUNDELL,
Member.

[Endorsed]: Entered Jul. 11, 1934. [15]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and John D. Kiley, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly qualified and acting Commissioner of Internal Revenue and holding office by virtue of the laws of the United States; that The Proctor Shop, Incorporated, the respondent on review, hereinafter called the respondent, is a corporation organized and existing under and by virtue

of the laws of the State of Oregon, engaged in selling ready to wear women's apparel on the installment basis, with its principal place of business at 331 Washington Street, Portland, Oregon; that the income tax return of said corporation for the fiscal year ended [16] January 31, 1930 was filed with the Collector of Internal Revenue for the District of Oregon and that the office of said Collector is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The nature of the controversy is as follows, to-wit:

Respondent is an Oregon corporation organized on October 6, 1927. Upon its organization it purchased the assets of an existing business known as Proctor's, Incorporated, which was engaged in selling ready to wear women's apparel on the installment basis. Respondent took over the assets and business as of October 1, 1927, and continued to conduct the business on the installment basis.

Prior to the organization of respondent several conferences were held between M. H. Holtz, who became president of respondent, his father, Aaron Holtz, and the attorney for the respondent on the question of financing the new enterprise. Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept stock because he desired to be assured that his advances would be repaid, and he also wanted

a definite income from the funds. It was deemed inadvisable to issue bonds to cover the loans, as that would affect the credit of the corporation. It was finally decided by the attorney for the respondent to have the new corporation issue a form of "debenture preference stock" to Aaron Holtz as evidence of the amounts advanced by him.

Respondent's articles of incorporation filed with the corporation department of the State of Oregon on October 6, 1927, state that the authorized capital stock consists of 10 shares of common stock [17] of the par value of $100 each, and 990 shares of preferred stock of the par value of $100 each. Upon incorporation 990 shares of the stock described as "debenture preference stock" were issued to Aaron Holtz.

Amounts representing 6 percent per annum on the amount of $99,000 were paid by respondent to Aaron Holtz, and accrued on its books for the fiscal year ended January 31, 1930. The amounts so paid and accrued have been claimed as interest deductions by respondent and have been disallowed as deductions by the Commissioner.

The Commissioner determined a deficiency in Federal income tax against the respondent for the fiscal year ended January 31, 1930 in the amount of $681.74, and on March 21, 1932 sent to it by registered mail notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928; that thereafter on May 14, 1932 the respondent filed an appeal from said notice of deficiency with the United States Board of Tax Appeals.

On September 28, 1933 the case was submitted to the United States Board of Tax Appeals for its decision. On May 16, 1934 the Board promulgated its opinion and on July 11, 1934 entered its decision and redetermination in accordance with its opinion, wherein and whereby it was ordered and decided that there was a deficiency in tax for the fiscal year ended January 31, 1930 in the amount of $23.39.

The Commissioner being aggrieved by the conclusions of law contained in said opinion and by said final decision, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit. [18]

III.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in determining that the sum of $5,940.00 paid during the fiscal year ended January 31, 1930 constituted interest on indebtedness, and as such was deductible from income.

2. The Board of Tax Appeals erred in determining that the so-called "debenture preference stock" of the respondent constituted indebtedness of the taxpayer.

3. The Board of Tax Appeals erred in its failure and refusal to hold that the sum of $5,940.00 paid by the respondent during the fiscal year ended January 31, 1930 constituted the payment of a dividend.

4. The Board of Tax Appeals erred in its failure and refusal to hold that the so-called "debenture preference stock" of the respondent was in fact and in law preferred stock.

5. The Board of Tax Appeals erred in determining that there was a deficiency in tax for the fiscal year ended January 31, 1930 in the amount of $23.39.

6. The Board of Tax Appeals erred in its failure and refusal to determine that there was a deficiency in tax for the fiscal year ended January 31, 1930 in the amount of $681.74.

WHEREFORE, he petitions that a transcript of the record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said [19] Court for filing and appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

(Sgd) FRANK J. WIDEMAN,
Assistant Attorney General
(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:
JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

United States of America,
District of Columbia—ss.

JOHN D. KILEY, being duly sworn, says that he is a Special Attorney in the office of the Assistant General Counsel for the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar wth the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) JOHN D. KILEY.

Sworn and subscribed to before me this 5 day of October, 1934.

(Sgd) GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 16, 1937.

[Endorsed]: Filed Oct. 5, 1934. [21]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

Proctor Shop, Incorporated,
331 Washington Street,
Portland, Oregon.

R. C. Nelson, Esq.,
800 Pacific Bldg.,
Portland, Oregon.

You are hereby notified that the Commissioner of Internal Revenue did, on the ..... day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 5th day of October, 1934.

(Sgd) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein,

is hereby acknowledged this 9 day of October, 1934.

(Sgd) THE PROCTOR SHOP, INC.,
Merriman H. Holtz, Pres.,
Respondent on Review.
(Sgd) ROSCOE C. NELSON,
Attorney for Respondent on Review.

[Endorsed]: Filed Oct. 16, 1934. [21]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.
3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. [Not included in record.] [22]

6. This praecipe.

(Sgd) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Counsel for respondent on review concurs in this praecipe for record.

(Sgd) ROSCOE C. NELSON,
Counsel for Respondent.

Service of a copy of the within praecipe is hereby admitted this 5th day of December, 1934.

(Sgd) ROSCOE C. NELSON,
Counsel for Respondent.

[Endorsed]: Filed Dec. 13, 1934. [23]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 23, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 31st day of Dec., 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7735. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. The Proctor Shop, Inc., Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 8, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7735

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PROCTOR SHOP, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
NORMAN D. KELLER,
FRANCIS I. HOWLEY,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7735

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PROCTOR SHOP, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 17–21) which is reported in 30 B. T. A. 721.

JURISDICTION

This case involves income taxes for the fiscal year ended January 31, 1930, in the amount of $681.74. This appeal was taken from the decision of the United States Board of Tax Appeals entered July 11, 1934 (R. 22). The case was brought to this Court by petition for review filed October 5,

1934 (R. 22–27), pursuant to Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

Whether amounts paid by the taxpayer corporation to the holder of "debenture preference stock" were deductible as interest or whether such amounts were in the nature of a dividend on preferred stock.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 141. *Interest.*— * * * So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing net income. * * *

STATEMENT

The facts embodied in the findings of fact by the Board (R. 11–17) may be briefly summarized as follows:

The taxpayer, an Oregon corporation, was organized in 1927 and upon organization acquired the assets of the business known as "Proctor's, Incorporated", which was engaged in selling women's ready-to-wear apparel. The business was continued along the same lines (R. 11).

In order to finance the new corporation, Aaron Holtz contributed the necessary funds prior to its organization and received in exchange therefor "debenture preference stock." As was contemplated at the time, Merriman H. Holtz, son of Aaron Holtz, became president of the taxpayer corporation (R. 11–12).

According to the articles of incorporation filed in October 1927 (R. 13), and in its annual report (R. 15) to the State Corporation Department for the year ended January 31, 1928, the taxpayer's capital stock was $100,000 divided into 990 shares of "debenture preference stock" and 10 shares of common stock, each classification having a par value of $100 (R. 13). All of the 990 shares of "debenture preference stock" were issued to Aaron Holtz (R. 15).

Although Aaron Holtz had been willing to lend the necessary funds to the contemplated organization but was not willing to accept stock because he de-

sired to be assured that his advances would be repaid and also wanted a definite income from the funds, it was nevertheless deemed inadvisable to issue bonds to cover the loans as that would affect the credit of the corporation. (R. 11.) Over objection and exception, a letter was admitted in evidence from the attorney for the taxpayer to Merriman H. Holtz, stating that the debenture preference stock certificates did not give their holder precedence over banks and other creditors but would entitle him to precedence over stockholders. His conclusion was that the certificates would entitle the holder to payment of interest whether profits were earned or not and that the failure to pay on the part of the corporation would place the holder in position to sue for the principal amount (R. 12–13).

The certificates for the debenture preference stock recited on their face certain provisions quoted from the articles of incorporation (R. 13–15). Among these was a statement of the capital stock of the corporation of $100,000, divided into the same classifications and amounts set forth in the articles of incorporation. They also recited that the stock was entitled to cumulative interest at the rate of 6% per annum before any dividends were to be paid on the common stock and in the event of dissolution of the corporation or distribution of its assets the debenture preference stock was first to be paid at par. Provision was also made against voting power and for the retirement of the deben-

ture preference stock at par but the failure for a period of two years to pay any quarterly interest was to render the corporation in default and to entitle the holders to declare the principal amount due and to institute action against the corporation for the par value, plus accumulated interest. The rights of the holders were specifically made inferior to the claims of general creditors and superior to the holders of any other class of stock (R. 13–15).

The amounts involved in this case, representing six percent per annum on the debenture preference stock held by Aaron Holtz, were paid by the taxpayer and were claimed as interest deduction by the taxpayer for the taxable year in question.

From the action of the Commissioner in denying the taxpayer's right to deduct payments made on its debenture preference stock, the taxpayer appealed to the Board of Tax Appeals which upheld the taxpayer's contention.

SPECIFICATION OF ERRORS TO BE URGED

The specification of errors is set forth in detail on pages 25 and 26 of the record and may be summarized as follows:

The Board of Tax Appeals erred: (1) in holding that the amounts paid by the taxpayer corporation constituted interest on indebtedness; (2) in holding that the debenture preference stock constituted indebtedness of the taxpayer corporation; (3) in

failing to hold that the amounts paid by the taxpayer corporation constituted payment of a dividend; (4) in failing to hold that the debenture preference stock was in fact and in law preferred stock; (5) in holding that there was a deficiency in tax for the fiscal year ended January 31, 1930, in the amount of $23.39 and (6) in failing to hold that there was a deficiency in tax for the fiscal year ended January 31, 1930, in the amount of $681.74.

SUMMARY OF ARGUMENT

The only question involved in this case is whether certain payments made on so-called debenture preference stock were in the nature of interest on indebtedness which is an authorized deduction in computing net income, or whether in reality they constituted dividends on stock which are not deductible.

The actual character of the certificates as determined by an examination of all the elements gives them the legal effect of stock rather than bonds or other forms of indebtedness. The designation of the payments as "interest" rather than "dividends" is not controlling.

The provisions of the taxpayer's articles of incorporation and its corporate report showing the capital structure as including debenture preference stock, as well as the reasons for its issuance in that form, reveal an intention to issue stock, especially in view of the ratio of 99 to 1 of common stock. The other provisions against voting power,

for retirement of the stock, payment of interest, and the right of suit upon default do not endow the certificates with the nature of indebtedness, especially where general creditors are specifically preferred and the only preference is one peculiar to all preferred stock.

The admitted purpose of issuing debenture preference stock and not bonds was to protect the credit of the corporation which otherwise would have had a paid-in capital of only $1,000 instead of $100,000. In the form as issued the credit was not impaired because the corporation surrendered no security and the stockholders' rank was inferior to the creditors'.

The certificates in this case represent capital stock and not ordinary indebtedness since on their face they provide that the holders are not entitled to participate in the corporate assets, even to the extent of their par value, until ordinary creditors are satisfied.

ARGUMENT

The nature of the certificates issued and the manner in which they were authorized show that they were certificates of preferred stock and not evidences of ordinary indebtedness

Section 23 (b) of the Revenue Act of 1928, *supra,* provides that in computing net income there may be deducted from gross income all interest paid on indebtedness. It is provided, however, by Article 141 of Treasury Regulations 74, Promulgated

under Section 62 of the Revenue Act of 1928, that "So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing net income."[1] The sole question in the instant case is whether certain certificates

[1] This regulation has been in effect under all the Revenue Acts, beginning with that of 1918 and including that of 1934 (Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 234 (a) (2); Regulations 45, Art. 564; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 234 (a) (2); Regulations 62, Art. 564; Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 234 (a) (2); Regulations 65, Art. 564; Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 234 (a) (2); Regulations 69, Art. 564; Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23 (b); Regulations 74, Art. 141; Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23 (b); Regulations 77, Art. 141; Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23 (b); Regulations 86, Art. 23 (b)), in all of which Acts the same or similar provisions to that here involved appeared. In the light of this frequent reenactment of the provision without change there can be at this late date no doubt that the regulation above quoted has the force and effect of law. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Elko Lamoille Power Co.* v. *Commissioner*, 50 F. (2d) 595 (C. C. A. 9th). The case of *Elko Lamoille Power Co.* v. *Commissioner*, *supra*, not only approves of the distinction made in the regulation referred to but recognizes the well-settled distinction between preferred stockholders and creditors. There this Court said, "A preferred stockholder is a mode by which a corporation obtains funds for its enterprise without borrowing money or contracting a debt, the stockholder being preferred as to principal and interest, but having no voice in the management. *State, ex rel. Thompson* v. *C. & C. R. R. Co.*, 16 So. Car. 524. It differs only from other stocks in that it is given preference and has no voting right. A preferred stockholder is not a creditor of the company. *Scott* v. *Balto. & Ohio R. Co.*, 93 Md. 475; *Lockhart*, v. *Van Alstyne*, 31 Mich. 76."

issued by the taxpayer are evidences of an ordinary corporate indebtedness entitling it to the interest deduction under Section 23 (b), *supra,* or whether such certificates are preferred stock with respect to which no deduction may be had for dividends paid thereon by virtue of Article 141, *supra.* The Board of Tax Appeals held that the payments in question represented interest and were therefore deductible. We contest the correctness of the Board's conclusion. That these were certificates of preferred stock and not evidences of corporate indebtedness is gathered first from the circumstances surrounding their issue. It was deemed inadvisable to issue bonds (R. 11). The certificates were issued pursuant to a charter provision which described the capital stock of the corporation and included therein the 990 shares of debenture preference stock (R. 13). This fact is indicative of an intent of the parties to issue stock and not borrow money. Indeed, at the time the holder of the certificates agreed to subscribe, the corporation was not yet in existence so as to negotiate a loan. (R. 11.) It is to be noted that the creation of indebtedness needs no charter provision to give it authorization. *Mining Co.* v. *Anglo-Californian Bank,* 104 U. S. 192; *Gorrell* v. *Home Life Ins. Co.,* 63 Fed. 371 (C. C. A. 7th).

In order to determine the fundamental character of the certificates it is necessary to view the terms in their entirety and not to segregate one clause in order to reach a conclusion. *In re Culbertson's,*

54 F. (2d) 753 (C. C. A. 9th). Although it is not contended that the designation of the certificates as stock is wholly controlling, it is an important fact to be considered because the real character of the certificates is attested by the language of the entire instrument. Cf. *Armstrong* v. *Union Trust & Savings Bank,* 248 Fed. 268 (C. C. A. 9th). In *Commissioner* v. *O. P. P. Holding Corp.,* 76 F. (2d) 11 (C. C. A. 2d), one of the most impelling reasons for the conclusion reached was the designation of the instrument. It was stated (p. 13):

> The petitioner urges that the name given to an instrument is not controlling, but that its inherent characteristics will determine its true nature and legal effect. This may be conceded, but it does not follow that the name by which the certificates are designated is to be completely ignored. Stocks and bonds both evidence a contract between their holders and the issuing corporation, and, in construing this contract, the language used in reducing it to writing will be indicative of the intention of the parties. See *Spencer* v. *Smith,* 201 F. 647, 651 (C. C. A. 8).

It is certainly not conclusive that the taxpayer in its articles of incorporation and its stock certificates designated the payments to be made by it as "interest" rather than "dividends." *Smith* v. *Southern Foundry Co.,* 166 Ky. 208, 179 S. W. 205; *Aluminum Castings Co.* v. *Routzahn,* 282 U. S. 92, 99.

The certificates issued by the taxpayer bear on their faces all the indicia of preferred stock (R. 15). In attempting to avoid the impairment of its credit by not issuing bonds (R. 11) the taxpayer was willing to bestow the guise of stock upon the certificates issued by so designating it in its articles of incorporation and in its first annual report to the State Corporation Department (R. 13–15). It now seeks to avoid the consequences from the standpoint of taxation by contending that what it actually issued were not really certificates of stock but certificates of indebtedness. In *People, ex rel. Cohn & Co.* v. *Miller,* 180 N. Y. 16, 72 N. E. 525, in considering certificates of a similar nature, it was said (pp. 22, 23):

> If a corporation may organize with a capital of $150,000, as alleged in its annual report to the comptroller and on the face of its certificate of preferred stock, leading the general public to believe that the total amount of its certificates represents capital contributed for the conduct of its business, when in fact two-thirds of the amount, instead of representing what its name indicates, is in fact a debt pure and simple, there is no safety in dealing with corporations.
>
> * * * * *
>
> The certificate of preferred stock in the case at bar states in its heading that the capital stock of the relator is $150,000. Nevertheless, we find in the body of the certificate, and in the terms and conditions endorsed

reversing 12 B. T. A. 772, where the amounts could be withdrawn at any time, although even in that case amounts already paid in were regarded as subject to the hazards of the business and dividends paid thereon were not allowable deductions as interest.

In practically all of the cases where a similar question has arisen the courts have given a great deal of weight to the position of the holder with reference to general creditors of the corporation. *Kentucky River Coal Corp.* v. *Lucas,* 51 F. (2d) 586 (W. D. Ky.); *Spencer* v. *Smith,* 201 Fed. 647 (C. C. A. 8th); *In re Fechheimer-Fishel Co.,* 212 Fed. 357 (C. C. A. 2d); *Fidelity Savings & Loan Ass'n* v. *Burnet,* 65 F. (2d) 477 (App. D. C.). In the case at hand the holder of the debenture preference stock was specifically subordinate to general creditors. One of the characteristics of capital stock "is, that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid." *Warren* v. *King,* 108 U. S. 389, 396. The consideration surrendered to a corporation in exchange for stock represents the capital on which a corporation is authorized to do business and constitutes one of the assets to which all creditors may look for the payment of their demands. *Armstrong* v. *Union Trust & Savings Bank, supra.* It is, therefore, most important to the consideration of this case to look upon the relation which the holder of the debenture preference stock bears to general

creditors. He enjoys no higher standing than does the preferred stockholder in other corporations and his position as regards general creditors leaves him without any of the attributes usually existent in a debtor-creditor relationship. With the other stockholders he is merely a co-adventurer in the business.

We submit that this case comes within the rule of *Armstrong* v. *Union Trust & Savings Bank, supra; Elko Lamoille Power Co.* v. *Commissioner, supra,* and *In re Culbertson's, supra,* all of which were decided by this Court.

It is contended that an examination of all of the provisions of the instruments, the circumstances attending the incorporation of the taxpayer and the issuance of the certificates will lead to the conclusion that the amounts paid were in reality dividends on preferred stock.

CONCLUSION

The decision of the Board of Tax Appeals should be reversed.

Respectfully submitted.

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
FRANCIS I. HOWLEY,
Special Assistants to the Attorney General.

SEPTEMBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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No. 7735

In the United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

THE PROCTOR SHOP, INC.,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals

---

BRIEF FOR RESPONDENT

DEY, HAMPSON & NELSON,
ROSCOE C. NELSON,
Attorneys for Respondent.

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Wishon-Watson Co. v. Commissioner, 66 Fed. (2d) 52, 54 (C.C.A. 9, 1929) 4, 25

In the United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

THE PROCTOR SHOP, INC.,

Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals

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BRIEF FOR RESPONDENT

STATEMENT OF CASE

Respondent upon its organization on October 6, 1927, purchased the assets of an existing business, Proctor's, Incorporated, which had been engaged in selling women's apparel on an installment basis. Respondent took over its assets and the business continued its operations. (R. p. 11.)

Prior to the organization of respondent, conferences were held between M. H. Holtz, who became its president, his father, Aaron Holtz, and its attorney, on the question of financing the new enterprise. Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept its stock. He desired to be assured that his advances would be repaid, and he wanted a definite income from the funds. It was deemed inadvisable to issue bonds to cover the loan as they would affect the credit of respondent. (R. pp. 11 and 12.)

Respondent's attorney decided that it should issue "debenture preference stock" and advised Aaron Holtz accordingly. In his letter to Mr. Holtz, the attorney stated (R. p. 12):

> "The so-called 'stock certificates' will provide definitely for the payment of interest whether profits are earned or not, so that except for the fact that Aaron Holtz waives his right to share with other creditors until they have been paid, he will be entitled to a definite interest return, and the failure to pay this interest will place him in position to sue the corporation for the principal amount represented by the certificates. As a stockholder, of course, he would have no such right."

The articles of incorporation, filed with the Corporation Department of the State of Oregon, stated that the authorized capital would consist of ten shares of common stock of the par value of $100.00 and 990

shares of "debenture preference stock." The debenture preference stock subsequently issued, included the provisions of the articles of incorporation. The certificates provided that the holder was entitled to cumulative interest at the rate of 6% per annum before any dividends were paid. On dissolution it should be first paid at par, plus all accumulated unpaid interest. The corporation reserved the right to redeem it at par, plus accumulated interest after December 1, 1927, and was "bound to redeem monthly beginning December 1, 1927, debenture preference stock of the par value of $1500.00 as a minimum." The failure of the corporation to pay quarterly interest for a period of two years, rendered the corporation in default and entitled the owners of the certificates to declare the principal amount due and institute action against the corporation for the par value of the certificates and the accumulated interest thereon. (R. pp. 14, 15.)

The amounts paid on the "debenture preference stock" were claimed by respondent as a deduction. The right so to do was denied by the petitioner. On its appeal to the Board of Tax Appeals, respondent was sustained.

SUMMARY OF ARGUMENT

Payments made by respondent to the holders of its "debenture preference stock" were payments of interest.

(a) The findings of the Board of Tax Appeals can not be questioned here as the transcript does not contain the evidence upon which the Board acted.

Winnett v. Helvering, 68 Fed. (2d) 614, 615 (C. C. A. 9, 1934).

Wishon-Watson Co. v. Commissioner, 66 Fed. (2d) 52, 54 (C. C. A. 9, 1933).

(b) Error suggested in petitioner's brief, but not included in his assignments of error, will be disregarded.

Rule 11 of the Circuit Court of Appeals for the Ninth Circuit.

Week v. Helvering, 68 Fed. (2d) 693, 694 (C. C. A. 9, 1934).

(c) The interested parties intended to create a debt, evidenced by certificates appropriate to that purpose and inconsistent with a stock relationship. The certificates are those of indebtedness.

In re Culbertson's 54 Fed. (2d) 753 (C. C. A. 9, 1932).

Best v. Oklahoma Mill Co., 253 Pac. 1005 (Okla. 1927).

Wiggin Terminals, Inc., v. United States, 36 Fed. (2d) 893 (C. C. A. 1, 1929).

Arthur R. Jones Syndicate v. Commissioner, 23 Fed. (2d) 833 (C. C. A. 7, 1927).

(d) The fact that the owners of the certificates are subordinated to general creditors does not change their relation to the corporation from that of creditor to that of stockholder.

Commissioner v. O. P. P. Holding Co., 76 Fed. (2d) 11 (C. C. A. 2, 1935).
Arthur R. Jones Syndicate v. Commissioner, 23 Fed. (2d) 833 (C. C. A. 7, 1927).

(e) There is no estoppel present to prevent a determination of the true character of the certificates.

Wiggin Terminals, Inc., v. United States, 36 Fed. (2d) 893 (C. C. A. 1, 1929).
Deery's Lessee v. Cray, 5 Wall 795; 18 L. Ed. 653.
Territory of Arizona, ex rel Gaines v. Copper Queen Consolidated Mining Co., 233 U. S. 87; 58 L. Ed. 863.
Leather Manufacturer's National Bank v. Morgan, 117 U. S. 96; 29 L. Ed. 811.
The Union Mutual Life Insurance Co. v. Mowry, 96 U. S. 544; 24 L. Ed. 674.

ARGUMENT

It is now completely established that a stockholder of a corporation can not also be its creditor by virtue only of the existence of that relation. The discord and questions raised in some of the earlier decisions have been settled once and for all, but we find still the contention sometimes made that the holder of a stock certificate is entitled to the rights of a creditor of the corporation. The brief for petitioner apparently is upon the basis that respondent has urged that the holders of the certificates issued by it have the combined rights of stockholders and creditors. We do not so contend. The

holders of those certificates are respondent's creditors. They have none of the rights of a stockholder. They have all the attributes of a creditor.

We believe it necessary to make the statement because of the position taken by petitioner. He assumes at the outset that the certificates issued by respondent are evidences of stock ownership, and then attempts to reconcile the provisions of those certificates with his assumption. He argues, not from the facts here found, but from the results he wished that the Board of Tax Appeals had adopted and desires this Court to reach. We perforce must consider a few fundamental principles ignored by petitioner—the attributes of a creditor relationship, and the limitations upon the rights of a stockholder, preferred or common.

It is not ordinarily a matter of any great difficulty to distinguish between a stockholder and a creditor. There are, it is true, border-line cases in which they enter the twilight zone. In the instant case, however, we are under the noonday sun.

What are the attributes of stock?

1. There is no obligation to re-pay the principal amount. The stockholder has a pro rata interest in surplus upon liquidation, but as long as the corporation continues in business no demand can be made for payment of the par value.

In the instant case the corporation is required to pay the par of the debentures at the rate of $1500.00 per month, beginning December 1, 1927.

2. Stockholders are entitled to dividends and preferred stockholders are entitled to preference in this regard, but in neither case may the corporation pay any such revenue to the stockholder out of capital. The attempt to do so may be enjoined and under the laws of some states there are penal sanctions.

Under these certificates there is a definite obligation to pay interest and there is no limitation which makes such payment contingent upon earnings.

3. Stockholders have the right to participate in corporate management. It frequently occurs that the right to vote is denied preferred stockholders under ordinary circumstances, but it is the universal practice in that regard, to accord such right to vote in the event of the failure to pay preferred stock dividends for stated periods.

In the instant case the holder of the debenture certificates under no circumstances had any voice in the corporate management. The failure to pay interest made the whole of the principal due and conferred upon him the right to institute action therefor.

What are the attributes of certificates of indebtedness?

It is unnecessary to list these because they are the converse in all respects of the attributes of stock. They involve a definite obligation, payable at a definite time. Interest does not depend upon earnings and ordinarily the certificate may be retired upon payment of the principal amount without increment, regardless of earnings. Each of these attributes was here present.

As suggested by petitioner nomenclature and labels must be disregarded, particularly so in the instant case. The certificates involved are called "debenture preference stock"—a contradiction, "Debenture" alone indicates a debt relationship, and "preference stock" that of stock. He can secure no aid from the title given to the certificates. The certificates, however, require the respondent to pay the holder interest at the rate of 6% per annum, payable quarterly, and reserve to respondent the right to redeem any number of certificates after December 1, 1927, and bound respondent "to redeem monthly beginning December 1, 1927, debenture preference stock of the par value of $1500.00." Upon the failure to pay interest for two years, the owner could accelerate the maturity of the certificates and sue the corporation for the principal amount plus interest. The holders were subrogated to general creditors of the corporation. The voting was vested exclusively in the common stock.

The intent of the parties is clearly, definitely, and uncontrovertedly shown. "Aaron Holtz was willing to

lend the necessary funds to the contemplated organization, but was not willing to accept stock because he desired to be assured that his advances would be repaid and he also wanted a definite income from the funds." (R. p. 11.)

"It was obviously the intent of the interested parties that the $99,000.00 advanced * * * was to be regarded as a loan." (R. p. 19.) These facts are undisputed and so found by the Board of Tax Appeals.

The certificates evidencing the contractual rights of respondent with their holders are consistent only with this purpose of the interested parties. Disregard the labels, pass over the terms "debenture preference stock," "interest", "par value", "redeem", but notice in passing that the use of the word "redeem" is consistent with the creation of a debt, it meaning "to remove the obligation of, as a note, but paying what is due * * * to fulfill, as a promise" (Webster's Collegiate Dictionary, 4th Edition)—and the primary purpose, to create a debt, clearly remains.

How can the provision requiring the payment of 6% interest quarterly be otherwise explained? How can the obligation of respondent to pay $1500.00 monthly on the certificates outstanding, *beginning seven weeks after its organization,* be reconciled with the stock relationship which is characterized by a permanent contribution of funds to the corporate enterprise. Again the provision for the acceleration of the maturity of the instrument

identifies it as one of indebtedness and not of stock. If there be read into the certificates the provision that interest should be payable only out of the profits of the corporation, the acceleration clause would be only a jumble of words. If profits were made, interest would be paid. It is only when the parties contemplate the failure of the corporation to make money that the acceleration clause has meaning. It is only when parties realize and intend that interest must be paid, regardless of the existence of a profit that an acceleration clause is included in a contract. The holders of the certificates are given no rights inconsistent with a debtor-creditor relationship. The provisions in the certificates can not be reconciled with the creation of a stock relationship.

The fact that the certificate holders are subordinated to the general creditors of the Company does not require any other conclusion. Varying degrees of superiority among creditors are common. There are secured creditors, first, second, or even lower, and general creditors. And those inferior to the others are not forced against their will into the position of a stockholder. *Commissioner v. O. P. P. Holding Co.*, 76 Fed. (2d) 11.

The fact that the money was desired to finance the corporate enterprises does not convert the instruments into certificates of stock. Bondholders advance money for the same purpose and for periods much longer than the five and one-half year period in which respondent bound itself to pay the obligations evidenced by the certificates. Seven weeks after the corporation was or-

ganized, it was obligated to pay at least $1500.00 a month upon the obligations. We know of no instance, petitioner neither here nor before the Board of Tax Appeals, has referred us to one where a corporation undertook the redemption of its preferred stock less than two months after its issuance.

We need comment upon only a few of the authorities cited by petitioner. We agree that labels are not conclusive. Each case of this type must be determined upon its own facts, only the controlling principles may be gleaned from the decisions. This Court has been called upon before to decide whether certificates are those of indebtedness or of stock. The problem was presented in *Armstrong v. Union Trust & Savings Bank,* 248 Fed. 268. It there appeared that in 1907 the corporation had authorized the issuance of preferred certificates of indebtedness which contained a clause that the holders were not stockholders, but creditors. In 1909 an issue of preferred stock was authorized. The certificates then provided for interest at the rate of 7% per annum and for the retirement of the stock. This Court held that the holders of the certificates of 1909 were stockholders and not creditors, saying:

> "The company appreciated very well the difference between certificates of indebtedness and preferred stock, as it, by its board of directors, provided for the creation of each kind of liability."

If the corporation had intended to create a debt, the provisions contained in the certificates issued only two

years before—that the holders were creditors and not stockholders—would clearly have been included. In the *Armstrong* case, the corporation intended to issue stock, and that intent was respected and adopted by the Court. In the instant one respondent and the interested parties intended to create an indebtedness to be evidenced by the certificates.

Next, is *Elko Lamoille Power Co. v. Commissioner,* 50 Fed. (2d) 595. The certificates there considered, provided for 7% cumulative dividends on the preferred stock, and for their redemption at 110 after three years. The stock had been sold by individuals upon their representations that the holders could surrender it at any time for the amount paid, plus accrued dividends. This Court held that the oral representations amounted only to collateral agreements between the purchasers of the stock and the officers of the corporation. The certificates were held to be stock certificates, the deciding factor being that the stock was redeemable at the option of the company. This is emphasized by the language used in distinguishing *Arthur R. Jones Syndicate v. Commissioner,* infra. In so doing, the Court said:

> "In the instant case the preferred stock could, *at the option of the corporation,* be redeemed within three years at 110. There was, however, no obligation to redeem. In the Jones Syndicate there was an express provision to pay at five years. It was in effect a bond payable in five years."

The *Elko Lamoille* decision is distinguished by the very language above quoted. As in the *Arthur R. Jones*

Syndicate case, the certificates here contain an obligatory provision for redemption, absolute and unconditioned.

Then there is the decision in *In Re Culbertson's,* 54 Fed. (2d) 753, where the corporation issued "preferred stock", providing for semi-annual dividends, and some of which stated that it would be redeemed on a date specified. This provision for redemption was urged to evidence the intent that the certificates were those of indebtedness. This the Court rejected, saying:

> "It is apparent that it was the intention of the parties that these certificates should evidence the right of the holders thereof to participate in the earnings of the corporation as holders of preferred stock entitled, by reason thereof, to receipt of the agreed proportion of the net earnings they were to receive before holders of common stock were entitled to share in such earnings."

Finding that it was the intent of the parties that the certificates should evidence ownership of stock and not of an indebtedness, and respecting that intent, the Court considered the other features incorporated in the certificates, and found all of them consistent with the stockholder relationship when interpreted in the light of the statutes and law of the State of Washington, the State of incorporation.

The intent of the interested parties is regarded as a material, if not the controlling element. This view is found also in the decisions of the Circuit Court of Ap-

peals for the 7th Circuit, in *Arthur R. Jones Syndicate v. Commissioner,* infra, and of the Circuit Court of Appeals for the 1st Circuit, in *Wiggin Terminals, Inc. v. United States,* infra.

The major difference between *In Re Culbertson's* and the instant case is the factor of intent. Preferred stock was intended in the *Culbertson* case, an indebtedness in the instant one. (R. pp. 11, 12, 19.)

The decisions noted seem to be the principal ones relied upon by petitioner. Singly or together the principles they establish, applied to the facts here involved, do not warrant the conclusion that the certificates issued by respondent are stock certificates. They support the contrary holding.

A few other decisions should also be considered.

In *Arthur R. Jones Syndicate v. Commissioner,* 23 Fed. (2d) 833, the Syndicate was organized to promote a real estate venture. $600,000.00 was needed to redeem the property from foreclosure sale. Preferred stock was sold, but sufficient funds were not realized therefrom. A loan was then sought. A prospective lender demanded interest at the rate of 14%. The loan was not negotiated, the interest rate being usurious. To avoid the usury law, the Syndicate's capital structure was revamped to provide for an additional class of preferred stock. The shares were to be redeemed July 1, 1922, "by payment of the par value thereof plus a dividend at the rate of

14% per annum * * *." In the event of the redemption, sale or other disposition of the property, the proceeds were to be applied, first, to the payment of the debts and obligations of the syndicate, and then to the payment of the first preferred shares. On failure to redeem this stock, the voting power and control was vested in its holders. Said the Court:

> "Aside from the form of the instrument which the parties adopted to embody their contracts, there is no evidence to contradict the asserted relationship of debtor and creditor. Not only does all the oral testimony confirm this conclusion, but the payments and other written evidence strongly confirm the words of the witnesses."

Taxpayer was permitted to show the true nature of the transaction. Note that in this case, the certificates were called first preferred shares. They provided for the payment of a dividend, for their redemption at par, and all the terminology was that of a stock certificate. Of prime importance is the additional stipulation in the articles of the Syndicate that the holders of the first preferred shares were inferior on redemption, sale or other disposition of the property to the general creditors of the corporation.

The *Jones Syndicate* decision was followed by the Circuit Court of Appeals for the 1st Circuit in *Wiggin Terminals, Inc. v. United States,* 36 Fed. (2d) 893, the Court saying:

> "The payment of interest in the form of dividends does not change its character when it is

shown that the reason for its taking that form was to avoid a usurious contract, or for some reason personal to the parties concerned. Arthur R. Jones Syn. v. Commissioner, supra.

"If it be shown that dividends paid are, according to the intent of the parties, in fact interest, and the stock on which the dividends are paid is merely held by the creditor as security, it makes no difference what the reason was for paying in that form. The courts look to the real character of the payment, and construe the statute liberally in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211."

An analogous case is that of *Best v. Oklahoma Mill Co.,* 253 Pac. 1005, a decision of the Supreme Court of Oklahoma. Action was brought to recover the principal amount plus interest on four "certificates of preferred stock." The certificates provided that the corporation would not create any mortgage without the written consent of its holders. A mortgage was executed without plaintiff's consent. The mortgagee contended that its rights were superior to those of plaintiff. Judgment was entered for defendants, plaintiff having elected to stand upon his petition after demurrers to it were sustained. The certificates provided:

" 'This certificate of preferred stock matures on February 1, 1925, and will be redeemed or retired by the Oklahoma Mill Company on that date by the full payment of the par value thereof, together with any cumulative dividends'."

After recounting certain general principles, the Court said:

"The third provision of the certificate, supra, is an absolute and unconditional promise of the corporation to redeem the stock of plaintiff on its due date or maturity to the extent of the par value and cumulative dividends, if there be any. It seems as absolute and binding as the obligation of a decidendi herein. This provision is inconsistent with, and obnoxious to, the theory that plaintiff is a preferred stockholder, for that a preferred stockholder, though having a preference over a common stockholder in distribution of assets, when he invests his money in the corporate stock of the company, takes the hazard of its success."

* * * * * *

"It thus appears that, while said certificate contains numerous provisions appropriate to preferred stock, none of these, construing the whole instrument together, are conclusive that the plaintiff purchased an interest in the company represented by said instrument, taking the hazard of never getting his money back. E converso, such provisions do not destroy, restrict, or condition the absolute promise to pay plaintiff found in the third paragraph. They do not show that the plaintiff is not a creditor."

Defendant there, as does petitioner here, relied upon *Spencer v. Smith,* 201 Fed. 647. The Oklahoma Court distinguished that decision, saying:

"One important distinction between that case and the one at bar is that the preferred stockholder went to the length of fixing his status as such by said recognition in the mortgage. It is not difficult thus to understand the statement in the opinion that there was no provision in the certificate of preferred stock which, if properly construed, is not appropriate to such certificate. A study of the syllabus above quoted discloses that the express agreement to re-

deem the stock is not the rationale of that decision. This is further borne out by the opinion in stating that the provisions for the payment of $11 per share to the preferred stockholders on dissolution of the assets 'was all the parties to the certificate intended.' The holding in that case that the claimant was a preferred stockholder is predicated upon the peculiar facts thereof, important among which is the acknowledgment of the certificate holder in the mortgage that he was simply a preferred stockholder. If plaintiff in the instant case had consented to a mortgage, fixing his status as a preferred stockholder, that case might be authority that the absolute agreement to pay, found in paragraph 3, would not constitute him a creditor."

Judgment was reversed and the cause remanded.

The assumption of the unconditioned obligation to pay the amount of the certificates, regardless of the existence of profits or earnings is a feature which can not be reconciled with the stockholder relationship. In the *Best* case, in the *Arthur R. Jones Syndicate* decision and in the instant case, it was the intent of the parties to create an indebtedness. In *Armstrong v. Bank,* and in *In re Culbertson's* there was the intent that stock be created.

In *Kentucky River Coal Corporation v. Lucas, Commissioner,* 51 Fed. (2d) 586 (D. C., W. D., Kentucky, 1931) there was also the purpose that certificates of preferred stock and not of indebtedness be issued. The corporation there involved provided for the issuance of debentures to be held as treasury stock for disposition

by the corporation and to use the proceeds to discharge the indebtedness of five corporations whose property was acquired. The intent that the certificates be those of stock is emphasized by the determination to hold the debentures as treasury stock, by the fact that in its income tax returns the corporation reported the amounts received from the sale of the debentures as invested capital, and so treated it in determining the taxes. The returns were made to the United States Government. There were no provisions in the certificates inconsistent with a stockholder relationship.

So also in *In re Fechheimer-Fishel Co.*, 212 Fed. 357 (C. C. A. 2, 1914), the certificates there considered contained provisions characteristic of stock and not of bonds, nor was there present the obligation of the company to pay them.

Again in *Smith v. Southern Foundry Co.*, 179 S. W. 205 (C. A., Kentucky, 1915), the charter fixed the company's capital at $40,000.00, of which $15,000.00 was represented by preferred stock. The intent to issue stock was found in the fact that if the preferred stock be considered a debt, the debt limitation provision would be meaningless, and the provision for 7% dividends would be usurious and in conflict with the statutes.

In *Fidelity Savings & Loan Ass'n v. Burnet*, 65 Fed. (2d) 477 (C. A., D. C., 1933), taxpayer, a building and loan association, sought to deduct as part of its expenses sums paid to its stockholders on its passbook stock, and

its full paid capital stock. The Court recognized that the problem of determining whether the holders of the stock were creditors or stockholders was complicated by the fact that taxpayer was a building and loan association. The Court said:

> "In the view we take of this case, there is, we think neither in the certificates of stock, nor in the by-laws, nor in the local law, anything which would justify us in saying that a member of the association holding these shares was, during any of the time involved in this dispute, in the position of creditor of the association. He received his agreed share of the earnings, and, if misfortune overtook the association, his investment was subject to the payment of its debts. He could participate in the management of the corporate affairs. He had, it is true, the advantages of withdrawal which the holder of permanent stock did not have, but this advantage accrued only during the solvency of the corporation. He did not withdraw, and, had the company become insolvent, he could neither have set off the amount of his subscriptions against his indebtedness to the company nor could he have shared in the assets on an equality with creditors."

The money paid on the certificates was not interest. The stockholders of the savings and loan association were given the right to participate in its management, a feature not accorded creditors. The holders of the certificates issued by respondent were not accorded that privilege. Furthermore, the Court itself recognizes that savings and loan associations are unique and governed by principles not applicable to the usual business corporation as is respondent.

Petitioner has not referred to a single decision involving certificates similar to those issued by respondent which would support a holding that these certificates are those of stock, but petitioner seeks to avoid a decision on the merits of this case by invoking the doctrine of estoppel. His chief support is *People v. Miller,* 180 N. Y. 16; 72 N. E. 525. The only question there involved was stated by the New York Court as follows:

> "The legal question is presented whether the laws of the State of New York permit the organization of a corporation in a manner calculated to mislead the general public as to the amount of its capital stock and its total indebtedness."

The Court refused to decide whether the holders of the certificates were stockholders or creditors, saying:

> "We do not feel inclined to decide this question in litigation to which none of the holders of preferred stock is a party, or in a condition to assert his rights. We do hold, however, that the question of the construction of the instrument being clearly a debatable one, the relator should, in the face of the declaration in the articles of association that the money represented by these certificates constitutes a part of the capital stock of the corporation, be estopped from asserting to the contrary in a proceeding to determine their liability to the franchise tax."

Note that the representation made by the corporation in that case was directed to the State of New York which sought to enforce the payment of the franchise tax. Note that the State of New York accorded the corporation the right to do business in that State upon

those representations. Such is the ordinary case of estoppel, the representation made to a party to act thereon. The party acts to his prejudice, and accordingly the representation can not be denied. These elemental principles of the law of estoppel have been recognized time and time again.

In *Bigelow on Estoppel,* 6th Edition, page 617:

> "*Only parties* and *their privies* are bound by the representation and only those whom the representation is made to or intended to influence and their privies may take advantage of the estoppel. However the act was *inter alios,* there can be no estoppel."

In *Deery's Lessee v. Cray,* 18 L. Ed. 653, 5 Wall. 795, the Court, speaking through Mr. Justice Miller, and dealing with the question of Estoppel, asked whether or not a certain course of conduct could be asserted to have estopped William Brent from claiming as heir to his father, answered its own question as follows:

> "*Clearly not, for the simple reason that no person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels.* That is precisely the case before us. The plaintiff claims under Brent and his deed. Defendants claim nothing under that deed, and deny all connection with the title it purports to give. They are strangers to it, and have no right to set up its recitals as estoppels." (Emphasis ours.)

And in *Territory of Arizona ex rel Gaines v. Copper Queen Consolidated Mining Co.,* 58 L. Ed. 863, the Court answered the contention that by paying an assessment the party making the payment was estopped to deny its validity, as follows:

> "In such a proceeding it is difficult to see how the principles of estoppel because of the description of the land made by the owner in returning the property or the payment of taxes, as appears from the finding in this case, could have application. *Estoppel ordinarily proceeds upon principles which prevent one from denying the truth of statements upon which others have acted, where the denial would have the effect to mislead them to their prejudice.*" (Emphasis ours.)

In *Leather Manufacturer's National Bank v. Morgan,* 29 L. Ed. 811, Mr. Justice Harlan said:

> "The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan vs. R. R. Co.,* 96 U. S. 720 (Bk. 24, L. ed. 744), it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe exisited, *if the latter has acted upon that belief.*
>
> * * * * * *
>
> "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or

> otherwise, to disclose the truth (which he has the means, by ordinary diligence, of ascertaining) and he neglects or omits to discharge that duty, whereby another is mislead *in the very transaction to which the duty related,* he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct." (Emphasis ours.)

Then again, in *The Union Mutual Life Ins. Co. v. Mowry,* 24 L. ed. 674, the Court said:

> "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a *fraud upon one who has been led to rely upon them.* They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, *had designedly induced another to change his conduct* or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment." (Emphasis ours.)

We are at a loss to understand how petitioner can urge an estoppel because respondent paid a larger license fee to the State of Oregon than it should have paid, on the theory that the certificates do not represent stock. Even the State of Oregon could not invoke the doctrine of estoppel because it was benefited, not damaged. Respondent paid more, not less than it should have paid. Petitioner was not a party to the transaction; he was not misled thereby; he did not act thereon; he did not change his position to his hurt. In fact he is a total stranger. Estoppel is not applicable to this decision,

nor to bar a showing of the true nature of these certificates.

A consideration of all the factors, the intent of the interested parties, the language of the certificates, the purpose and the plans, when meaning and effect are given to them in their entirety, require the conclusion that the certificates represent an indebtedness and not stock ownership. Payments made thereon are payments of interest which respondent was entitled to deduct.

One other point should be noted. It is suggested by petitioner, on page 4 of his brief, that the findings of fact made by the Board were based upon improper testimony. The transcript of the record in this cause, does not include the evidence submitted to the Board. The findings made can not now be attacked, they are conclusive.

Winnett v. Helvering, 68 Fed. (2d) 614, 615 (C. C. A. 9, 1934).
Wishon-Watson Co. v. Commissioner, 66 Fed. (2d) 52, 54.

Nor do petitioner's assignments of error challenge the action of the Board in admitting into evidence improper testimony. Error suggested in the briefs, but not raised in the assignments of error, will not be considered.

Rule 11 of this Court.
Week v. Helvering, 68 Fed. (2d) 693.

CONCLUSION

There is only one feeble contention to sustain petitioner's position, and that is that the instrument is called "debenture stock". Conceding for the argument that that is a persuasive factor, the findings of fact, the intent of the parties, conclusively negative the asserted inference from the bare nomenclature.

As a matter of fact, of course, the title "Debenture Stock" is a contradiction in terms and makes the instrument ambiguous on its face and contradictory. A resort to the instrument itself and to evidence *aliunde* is therefore necessary.

The priority provisions are not inconsistent with the rights of the holder as a stockholder, nor with his status as a creditor, but the right of the holder to interest regardless of earnings and to sue the corporation for the amount of the "stock" and interest in case of default in payment of interest, is irreconcilable with any "stock" theory.

We assert with confidence that no Court has ever held to be stock an instrument under the terms of which there is: (a) An express unconditional obligation to pay interest. (b) An express unconditional obligation to pay principal. (c) Absence of voting power, choice in management, share in surplus, or earnings, either before or at the time of dissolution.

Respectfully submitted,

DEY, HAMPSON & NELSON,
ROSCOE C. NELSON.

No. 7736

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

HOPE C. NEAVES,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—2-25-35

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:
HARRY KAHAN, C. P. A.

For Respondent:
J. H. YEATMAN, Esq.

Docket No. 50787

HOPE C. NEAVES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

1930

Nov. 11—Petition received and filed. Taxpayer notified. (Fee paid)

Nov. 12—Copy of petition served on General Counsel.

Dec. 2—Answer filed by General Counsel.

Dec. 17—Copy of answer served on taxpayer—Circuit calendar.

1933

Aug. 2—Hearing set for week of Sept. 11, 1933, Long Beach, Calif.

Sept. 12—Hearing had before Mr. Marquette, Division 1, (called Sept. 11, 1933) on merits. Submitted. Briefs due Nov. 12, 1933.

1933

Oct. 2—Transcript of hearing Sept. 12, 1933 filed.

Oct. 16—Brief filed by taxpayer.

1934

May 14—Memorandum opinion rendered—Mr. Marquette, Division 1. Judgment will be entered of no deficiency.

May 16—Decision entered—Division 1.

July 7—Motion for reconsideration and to vacate memorandum opinion and decision filed by General Counsel. 7/26/34 denied.

Oct. 12—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Oct. 23—Proof of service filed (2)

Oct. 27—Motion for denial of request for certification of a transcript of record filed by taxpayer.

Nov. 6—Order that petitioner's motion of Oct. 27, 1934 be denied for lack of jurisdiction entered.

Nov. 19—Praecipe filed by General Counsel.

Dec. 3—Affidavit of service of praecipe filed.

Dec. 4—Proposed amendments to statement of evidence lodged by taxpayer. 12/21/34 denied.

Dec. 5—Amended praecipe filed.

Dec. 5—Further proposed amendments to statement of evidence lodged by taxpayer. 12/21/34 denied.

Dec. 5—Motion for extension to 12/19/34 to complete record filed by General Counsel.

1934

Dec. 5—Order enlarging time to Dec. 19, 1934 for preparation of evidence and delivery of record entered.

Dec. 14—Proof of service of amended praecipe filed.

Dec. 14—Statement of evidence lodged.

Dec. 14—Notice of lodgment of statement of evidence with hearing notice 12/19/34 filed. [1*]

Dec. 18—Motion for extension to 1/19/35 to complete record filed by General Counsel.

Dec. 18—Order enlarging time to Jan. 19, 1935 to prepare evidence and transmit record entered.

Dec. 19—Hearing had before Miss Matthews, Division 13, (Marquette) on approval of statement of evidence.

Dec. 19—Transcript of hearing of Dec. 19, 1934 filed.

Dec. 21—Statement of evidence approved and ordered filed. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 50787

HOPE C. NEAVES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (IT:AR:E-1-ML-60D), dated October 15, 1930, and as a basis of her proceedings alleges as follows:

(1) The Petitioner is an individual residing at 1720 Chevy Chase Drive, Beverly Hills, California.

(2) The Notice of Deficiency (a copy of which is attached and marked EXHIBIT "A") was mailed to the taxpayer on October 15, 1930.

(3) The taxes in controversy are income taxes for the calendar year 1928, and for Twelve Hundred Forty-four Dollars Nineteen Cents ($1,244.19).

(4) The determination of tax set forth in this said Notice of Deficiency is based upon the following errors:

(a) The failure of the Commissioner to find that the sale of eighty (80) shares of capital stock of the United Wire and Supply Company resulted

in a deductible loss of Thirteen Hundred Sixty Dollars ($1,360.00).

(b) The failure of the Commissioner to find that the sale of one hundred fifty (150) shares of six percent (6%) preferred stock of the United Wire and Supply Company resulted in a capital net loss of Eight Thousand Four Hundred Fifty-five Dollars ($8,455.00).

(5) The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

(a) The taxpayer purchased eighty (80) shares of United Wire and Supply Company preferred capital stock from Richard S. Moore and Company, Investment Securities, Providence, Rhode Island, on December 26, 1926, for Sixteen Hundred Dollars ($1,600.00). This stock was exchanged in 1927 for eighty (80) shares of common stock in the same company, in accordance with a reorganization plan. On December 18, 1928, the taxpayer sold this eighty (80) shares of stock to George B. Champlin, her father, for Two Hundred Forty Dollars ($240.00), incurring a loss of Thirteen Hundred Sixty Dollars ($1,360.00).

(b) The taxpayer acquired one hundred fifty (150) shares of senior preferred stock of the United Wire and Supply Company on January 29, 1917, the cost of the stock, namely Fifteen Thousand Dollars ($15,000.00), being paid by the taxpayer's father, George B. Champlin. As a result of the company's [3] reorganization, this one hundred fifty (150) shares was exchanged for one hundred eighty-

seven (187) shares of preferred stock in the new corporation. On December 31, 1928, this one hundred eighty-seven (187) shares of preferred stock was sold to George B. Champlin for Sixty-five Hundred Forty-five Dollars ($6,545.00), resulting in a capital net loss of Eighty-four Hundred Fifty-five Dollars ($8,455.00).

(c) The above sales were real and valid transactions, definitely placing legal and equitable ownership out of the hands and out of the control of the seller, and checks in full payment were received by the taxpayer upon consummation of the sale.

(6) Wherefore, the Petitioner prays that this Board may hear the proceeding before a division of the Board in Los Angeles, and determine that the sale of stock of the United Wire and Supply Company by the taxpayer resulted in a deductible ordinary loss of Thirteen Hundred Sixty Dollars ($1,360.00), and a capital net loss of Eighty-four Hundred Fifty-five Dollars ($8,455.00), and that there is no deficiency due from the Petitioner for the year 1928.

HARRY KAHAN,
Counsel for Petitioner.
625 Pacific National
Building, Los Angeles.

State of California,
County of Los Angeles—ss.

Hope C. Neaves, being duly sworn, says that she is the taxpayer named in the foregoing Petition, and is familiar with the statements contained

therein, and that the facts therein stated are true to the best of deponent's knowledge and belief.

HOPE C. NEAVES,
Petitioner.

Subscribed to before me this 6th day of November, 1930.

[Seal] NORMAN C. ECKSTEIN,
Notary Public in and for State of California, County of Los Angeles.

My commission expires Nov. 20, 1932. [4]

EXHIBIT "A"

NP-2-28
October 15, 1930.

IT:AR:E-1
ML-60D
Mrs. Hope C. Neaves
1720 Chevy Chase Drive,
Beverly Hills, California.

Madam:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $1,244.19 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
(Signed) By J. C. Wilmer,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [5]

STATEMENT.

IT:AR:E-1
ML-60D

In re: Mrs. Hope C. Neaves,
1720 Chevy Chase Drive,
Beverly Hills, California.

Tax Liability

Year—1928.
Corrected Tax Liability—$2,294.66.
Tax Previously Assessed—$1,050.47.
Deficiency—$1,244.19.

The report of the internal revenue agent in charge at Los Angeles, California, relative to an examination of your books and records, has been reviewed and approved by this office.

Consideration has been given to information furnished in your protests to the above-mentioned official under dates of April 1, 1930 and May 19, 1930, at a conference held in his office under date of April 8, 1930 and to a protest submitted to this office under date of September 12, 1930.

It is noted that the proposed adjustments to which you take exception are the disallowance of $1,360,000 claimed as a loss on the sale to your father of common stock of the United Wire and Supply Company, and the disallowance of $8,455.00 claimed as a capital net loss on the sale to your father of preferred stock of the same company.

It is shown that your father had power of attorney of sufficiently wide scope to allow him to acquire stock for you or dispose of it without consulting you; that he has access to your safe deposit

box in the Rhode Island Trust and Safe Deposit Company; that when stocks are acquired for your account they are deposited therein by him; that when stock is sold for your account he endorses the certificates, attaches his power of attorney thereto and presents it for transfer. The evidence shows that a portion of the stock had been received by you as a gift from your father, that your brother acting as your attorney sold the stock to your father, and that approximately five months later your father sold the stock in question to you.

To establish a loss a sale must be a real valid transaction definitely placing legal and equitable ownership out of the hands and out of the control of the seller. The evidence furnished does not show conclusively that the transactions were one of absolute barter or sale. It is held by this office that the alleged losses were not of such a nature as to render them deductible for purposes of taxation. [6]

In the following decisions of the United States Board of Tax Appeals to which you referred in support of your contentions, conditions are shown that would have weight in establishing the sales as bona fide. The evidence does not show that such conditions existed in your case:

Case of Robert Kurtz published in Board of Tax Appeals Decision, volume 8, page 679.

In this case it is shown that the purchaser expected to realize substantial profit from Italian lire (purchased from his half-brothers who composed the parnership of Kurtz Brothers) in connection with negotiations then pending for the purchase of Italian olive oil.

Case of D. L. Larsh—published in Board of Tax Appeals Decisions, volume 6, page 1086.

It is shown that the sale of stock to the petitioner's brother, although made for the purpose of establishing a loss, was made without any reservations, and that the purchaser being in charge of the business, was in a position to realize any possible benefit which might accrue to the stock at a subsequent date. It appears also that the taxpayer did not repurchase the stock.

Case of B. B. Greever, published in Board of Tax Appeals Decisions, volume 6, page 587.

The evidence shows that in the taxable year certain oil leases had been demonstrated to be worthless for all practical purposes and that while they might have had a speculative value it was no more than nominal. It is shown that the sales were made to the petitioner's brother-in-law and secretary in order that there might be no question that the petitioner had divested himself of any interest in the leases. The leases were not repurchased by the petitioner.

Case of P. P. Griffin, published in Board of Tax Appeals Decisions, volume 7, page 1094.

The petitioner's attorney advised him to sell part of his stock of Bee Tree Lumber Company in order that his books of account would not show thereon an asset of questionable value and also in order that he might claim a loss on his income tax return. He sold the stock to his brother and his secretary for $6,100.00, and checks in full payment were received during the [7] taxable year. No agreement

or understanding existed concerning the repurchase of the stock. During the following year the petitioner repurchased the stock.

Your return has been adjusted as follows:

Net income reported on return		$42,089.76
Add:		
1. Interest on tax-free covenant bonds	$ 605.00	
2. Loss on sale of stock disallowed	1,360.00	1,965.00
Total		$44,054.76
Deduct:		
3. Interest income reduced	$ 250.00	
4. Dividends reduced	300.00	
5. Interest deduction increased	262.50	812.50
Ordinary net income adjusted		$43,242.26
Capital net loss reported		8,455.00
6. Capital net loss disallowed		8,455.00
Capital net loss adjusted		None
Net income adjusted		$43,242.26
Less:		
Dividends	$27,631.00	
Personal exemption	3,500.00	31,131.00
Income subject to normal tax		$12,111.26
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on 4,000.00		120.00
Normal tax at 5% on 4,111.26		205.56
Surtax on 43,242.26		2,156.65
Total tax		$ 2,542.21
Less:		
Earned income credit	$ 5.63	
Tax paid at source	241.92	247.55
Tax assessable		$ 2,294.66
Tax previously assessed		1,050.47
Deficiency in tax		$1 244.19

Explanation of Changes

1. Interest on tax-free covenant bonds has been increased as follows:

$250.00 Northern Texas Electric Company
$180.00 Shaffer Oil and Refining Company
175.00 New York, New Haven and Hartford Railroad Company

$605.00 Total.

2 and 6. Disallowance of losses on sale of United Wire and Supply Company stock explained above.

3. Interest of $250.00 on bonds of Northern Texas Electric Company has been transferred from item 3 to item 3(a) for inclusion with other interest on tax-free covenant bonds.

4. Dividends from E. M. Dart Manufacturing Company were found to be overstated by $300.00.

5. The deduction for interest paid has been increased by $262.50.

You are advised that a copy of this communication has been transmitted to your attorney, Mr. Harry Kahan, 625 Pacific National Building, Los Angeles, California, who has on file in this office a duly recorded power of attorney.

[Endorsed]: Filed Nov. 11, 1930. [9]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of

Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph (1) of the petition.

2. Admits the allegations contained in paragraph (2) of the petition.

3. Admits the allegations contained in paragraph (3) of the petition.

4. Denies that the respondent erred in the determination of the said deficiency as alleged in sub-paragraphs (a) and (b) of paragraph (4) of the petition.

5. Denies all of the material allegations contained in sub-paragraphs (a) to (c), inclusive, of paragraph (5) of the petition.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Sgd) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. B. SCHLOSSER,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Dec. 2, 1930. [10]

[Title of Court and Cause.]

Harry Kahan, C. P. A., for the petitioner.
J. H. Yeatman, Esq., for the respondent.

MEMORANDUM OPINION.

MARQUETTE: The respondent has determined a deficiency in income tax against the petitioner for the calendar year 1928 in the amount of $1,244.19. In her return for that year the petitioner claimed a loss of $1,360 on the sale of common stock of United Wire & Supply Co., and a capital net loss of $8,455, on the sale of preferred stock of the same company. These claimed losses were disallowed by the respondent and the only question for decision is whether such disallowance was proper. [11]

It appears that in 1928 petitioner was the owner of 80 shares of common stock of United Wire & Supply Co., which had been acquired December 29, 1926, at a cost of $1,600, and 150 shares of preferred stock of said company acquired in 1917 by gift from her father, which stock had a cost of $15,000. The petitioner, a resident of California, kept the stock in a safe deposit box in Providence, R. I., to which her brother, who acted for her in business transactions under a power of attorney, had access. In the latter part of 1928 the petitioner was advised by her brother to sell the 80 shares of common stock and 150 shares of preferred stock of United Wire & Supply Co., to which she assented, but she had no knowledge to whom the stock was to

be sold. On December 18, 1928, petitioner's said brother sold the stock to petitioner's father receiving therefor $240 for the 80 shares of common stock and $6,545 for the 150 shares of preferred stock, and said amounts were paid to petitioner by check of her father in the amount of $6,785 and deposited to petitioner's account in the Phenix National Bank of Providence, R. I.

There was no agreement or understanding between petitioner and any other person that she could or would purchase said stock or any part thereof, and the said sale price of $6,785 represented the prevailing market price of the stocks at the time of said sale. The said stock so sold or similar stocks were reacquired by petitioner in May, 1929.

In her income tax return for 1928 petitioner claimed a loss of $1,360 on the sale of the 80 shares of common stock, and a capital net [12] loss of $8,455 on the sale of the preferred stock, both of which claims the respondent disallowed on the ground that the transaction was not a bona fide sale.

The only limitation upon losses claimed to have been sustained in sales of stock contained in the Revenue Act of 1928, is in section 118, and under the facts of this case such section is not applicable. In a situation such as is disclosed by the findings of fact herein, it is the duty of the Board to scrutinize the transaction and to require clear proof that the transaction was bona fide and not colorable, and that the consideration received was commen-

surate with the market value of the property sold. We find that the petitioner, upon the advice of her brother who acted as her business advisor, authorized the sale by him of the stocks in question without any knowledge as to who would purchase them and that there was no agreement or understanding to repurchase the same. The price received on the sale was the then market value of the stocks, and there is nothing in the record to indicate that the transaction was a subterfuge or that petitioner retained any title or rights in or to the stocks after the sale. The fact that in May of the following year the petitioner reacquired the same or similar stocks, not being within the inhibition of the statute, is only material in so far as it throws light upon the bona fides of the sale. As said by the court in Commr. v. Hale, 67 Fed. (2d) 561, 563:

> The mere fact that the transfer was made by the appellee for the avowed purpose of reducing his income tax does not render it invalid, when the sum received was equal to what could otherwise be obtained from other parties, as in this case. Wiggin v. Commissioner of Internal Revenue, 46 Fed. (2d) 743, 745-6; [13] Bullen v. State of Wisconsin, 240 U. S. 625.
>
> To hold such transfers are valid to create deductible losses in computing income taxes may furnish opportunity for fraud upon the government, and courts will require clear proof that the transaction was bona fide and not subterfuge, and that full value was paid; but when,

as in this case, it is conceded that full value was paid and from the separate property of the wife, we think a deductible loss occurred under Sec. 214 (a) (5) of the Revenue Act of 1926.

We are of opinion that the evidence herein warrants the conclusion that the sale was a bona fide sale and that the petitioner is entitled to the deductions claimed.

Judgment will be entered of no deficiency.

Enter:

[Endorsed]: Entered May 14, 1934.] [14]

United States Board of Tax Appeals
Washington

Docket No. 50787

HOPE C. NEAVES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered May 14, 1934, it is

ORDERED and DECIDED: That there is no deficiency for the calendar year 1928.

Enter:

[Seal] (Sgd) JOHN J. MARQUETTE,
Member.

[Endorsed]: Entered May 16, 1934. [15]

[Title of Court and Cause.]

MOTION FOR RECONSIDERATION AND TO VACATE MEMORANDUM OPINION AND DECISION.

Now comes the respondent, by and through his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully moves the Board to reconsider its memorandum opinion and decision of no deficiency entered in the above proceeding on May 16, 1934, and for cause shows:

1. That the second error alleged in the petition is the failure of the Commissioner to find that the sale of 150 shares of 6% preferred stock of United Wire and Supply Company resulted in a capital net loss of $8,455.00. In respondent's answer it was denied that respondent erred in the determination of the deficiency as alleged in the petition, thus one of the issues joined by the pleadings is whether or not the petitioner sustained a capital net loss of $8,455.00 on the sale of 150 shares of the 6% preferred stock of the United Wire and Supply Company.

2. The petitioner testified, on both direct and cross examination, that the shares of 6% preferred stock of United Wire and Supply Company on which the loss of $8,455.00 is claimed and allowed by the Board, was acquired by gift from her father in the year 1917. (Tr. pages 4 and 17). [16]

3. Section 113(a)(4) of the Revenue Act of 1928 provides:

> "The basis for determining the gain or loss from the sale or other disposition of the property acquired after February 28, 1913 shall be the cost of such property; except that
> * * * * * * *
> If the property was acquired by gift or transfer in trust on or before December 31, 1920 the basis shall be the fair market value of such property at the time of such acquisition.
> * * *."

4. No evidence whatever was adduced at the hearing of this proceeding to show what the fair market value of the 150 shares of preferred stock of United Wire and Supply Company was in 1917 when it was acquired by petitioner from her father by gift. There was, therefore, nothing before the Board from which it could have properly determined the amount of the loss, if any, that was sustained on the sale of the stock in 1928. The burden was not only on the petitioner to prove that she sustained a loss on the sale but she had the duty of showing the basis for it. This she has utterly

failed to do. A showing of what the stock cost the donor is not sufficient. The donee takes the donor's basis for gain or loss only in the case of property acquired by gift after December 31, 1920. Where as here the gift was made prior to such date the statute plainly says that the basis for gain or loss is the fair market value of the property at the date the gift was made. Hence, the fair market value of the stock in question was an essential element of petitioner's case, and having omitted to show what that value was on the basic date, the Board erred in allowing the loss claimed.

WHEREFORE, it is prayed that the memorandum opinion of May 14, 1934 and decision entered pursuant thereto be vacated and set aside, and that [17] a revised opinion be promulgated in which the loss claimed on the sale of the 150 shares of stock in question be denied, and that provision be made for the entering of a decision under Rule 50.

(Sgd) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:

JAMES H. YEATMAN,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Jul. 7, 1934.

[Endorsed]: Denied Jul. 26, 1934. [18]

In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and James H. Yeatman, Special Attorney for the Bureau of Internal Revenue, and respectfully shows:

I.

JURISDICTION.

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review is an individual and an inhabitant of the State of California, residing at Beverly Hills, California. The respondent on review filed her Federal income tax return for the calendar year 1928 with the Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit. [19]

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of

the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II.

PRIOR PROCEEDINGS.

The Commissioner determined a deficiency of $1,244.19 in the Federal income tax liability of the respondent on review and pursuant to the provisions of Section 272 of the Revenue Act of 1928 sent notice of such deficiency to the respondent by registered mail. Thereafter the respondent on review duly filed a petition with the United States Board of Tax Appeals praying for a redetermination of the deficiency. The proceeding came on for hearing before the Board in due course. On May 14, 1934 the Board promulgated its memorandum opinion, and on May 16, 1934, pursuant to said memorandum opinion, the Board entered its decision (final order of redetermination) wherein it was ordered and decided that there is no deficiency in the income tax liability of the respondent for the calendar year 1928. On July 7, 1934 the Commissioner filed with the Board a motion to reconsider and vacate its memorandum opinion and decision. The Board denied said motion on July 26, 1934.

III.

NATURE OF CONTROVERSY.

The nature of the controversy is as follows:

On her return for the calendar year 1928 the respondent claimed an ordinary loss of $1,560.00 on

the sale of 80 shares of the common stock of the United Wire and Supply Company and a capital net loss of $8,455.00 on the sale of 150 shares of preferred stock of the same Company. The [20] Commissioner disallowed the losses claimed on the ground that the sales were not bona fide. The 80 shares of common stock were acquired by the respondent by purchase on December 29, 1926, and the 150 shares of preferred stock were acquired by her by gift from her father in the year 1917. The stocks in question were kept in respondent's safe deposit box in Providence, Rhode Island. Respondent's brother had access to her deposit box and also acted for her in business matters under a power of attorney. In the latter part of 1928 the respondent was advised by her brother to sell the stocks to which she assented. On December 18, 1928 respondent's brother sold the stocks to their father and received therefor $240.00 for the 800 shares of common and $6,545.00 for the 150 shares of preferred, which sums were deposited to respondent's account in the Phoenix National Bank of Providence, Rhode Island. Respondent repurchased the stocks from her father in May, 1929. No evidence was adduced at the hearing of the cause by the Board of Tax Appeals to show what the 80 shares of common stock cost the respondent or to show what the fair market value of the 150 shares was at the time same were received by respondent by gift from her father. Notwithstanding this the Board of Tax Appeals determined that the losses were allowable in the amounts claimed.

IV.

ASSIGNMENTS OF ERROR.

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final decision rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors, and each of them, which the avers, occurred in the said record, proceeding, opinion, and final decision so rendered and entered by [21] the Board of Tax Appeals:

1. The Board erred in finding as a fact that the 80 shares of common stock of the United Wire and Supply Company were acquired by the taxpayer at a cost of $1,600.00.

2. The Board erred in finding as a fact that the 150 shares of preferred stock of United Wire and Supply Company had a cost of $15,000.00.

3. The Board erred in finding as a fact that the 80 shares of common stock of the United Wire and Supply Company cost the sum of $1,600.00 for the reason that such finding is not supported by any substantial evidence.

4. The Board erred in finding as a fact that the 150 shares of preferred stock of United States Wire and Supply Company cost the sum of $15,000.00 for the reason that such finding is not supported by any substantial evidence.

5. The Board erred in determining and deciding that the cost of the 150 shares of stock of the United

Wire and Supply Company is the proper basis for determining gain or loss from the sale or other disposition thereof.

6. The Board erred in determining and deciding that the taxpayer sustained a deductible loss of $1,360.00 on the sale of 80 shares of common stock of United Wire and Supply Company, and a deductible loss of $8,455.00 on the sale of 150 shares of preferred stock of the United Wire and Supply Company.

7. The Board erred in not approving and affirming the Commissioner's determination on the ground that the taxpayer failed to meet the burden cast upon her by statute of proving the basis for gain or loss, if any, [22] on the sales or disposition of the said common and preferred stock of the United Wire and Supply Company.

8. The Board erred in determining the taxpayer's tax liability and deciding that there was no deficiency for the year 1928.

9. The Board erred in failing to approve the deficiency in tax for the year 1928 as determined by the Commissioner.

10. The Board erred in not rendering judgment for the Commissioner for the full amounts disclosed by the deficiency letter for the reason that any other judgment was not supported by any competent or substantial evidence nor according to law.

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Ap-

peals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd) FRANK J. WIDEMAN,
Assistant Attorney General.

(Sgd) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:
JAMES H. YEATMAN,
Special Attorney,
Bureau of Internal Revenue. [23]

JAMES H. YEATMAN, being duly sworn, says that he is a special attorney in the office of the Assistant General Counsel for the Bureau of Internal Revenue and one of the attorneys for the petitioner on review, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) JAMES H. YEATMAN.

Sworn and subscribed to before me this 12th day of October, 1934.

(Sgd) H. B. LINTON,
Notary Public

My commission expires April 16, 1937.

[Endorsed]: Filed Oct. 12, 1934. [24]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

Harry Kahan, Esq.,
Pacific National Building,
Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 12th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 12th day of October, 1934.

(Signed) ROBERT H. JACKSON
Assistant Attorney General for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review

and assignments of errors mentioned therein, is hereby acknowledged this 16th day of October, 1934.

HARRY KAHAN
Attorney in fact for Respondent
on Review.

[Endorsed]: Filed Oct. 23, 1934. [25]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

Mrs. Hope C. Neaves,
1720 Chevy Chase Drive,
Beverly Hills, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 12th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 12th day of October, 1934.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this.....day of October, 1934.

HOPE C. NEAVES

Respondent on Review.

[Endorsed]: Filed Oct. 23, 1934. [26]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Hon. John J. Marquette, Member of the United States Board of Tax Appeals, on September 12, 1933. Harry Kahan appeared for the petitioner therein, and E. Barrett Prettyman, former General Counsel for the Bureau of Internal Revenue, appeared for the respondent therein.

MRS. HOPE C. NEAVES,

having been duly sworn as a witness, testified as follows:

The 150 shares of 6% preferred stock of the United Wire and Supply Company which I stated on my tax return was acquired in 1917 was given me by my father, for which he paid a certain sum

(Testimony of Mrs. Hope C. Neaves.)

of money. It was about $15,000.00. I held the stock until it was sold. In regard to the 80 shares of 7% preferred stock which were shown in Schedule C of my return, they were acquired on December 29, 1926 and were held by me until they were sold. The date of sale was December 13, 1928. At this point there was introduced and received in evidence a cancelled check dated December 18, 1928 on the Phoenix [27] National Bank, Providence, Rhode Island, payable to the order of Hope C. Neaves for $6,785.00. According to her income tax return Mrs. Neaves received $240.00 for the 80 shares of 7% stock and $6,545.00 for the 150 shares of 6% preferred stock, making a total of $6,785.00 as represented by the check dated December 18, 1928. This check was deposited in the bank to my account by my brother who was acting as attorney for me under a power of attorney. The check represents the sale of the stock. At the time the stock was sold I was living in Beverly Hills. The stock at the time it was sold was in Providence. It was in my custody in a safe deposit box. My brother had access to my safe deposit box. As previously stated, my brother was acting as my attorney under a power of attorney. My brother's name is George S. Champlin. My father's name is George B. Champlin. The stock was sold to my father by my brother. My brother advised me to sell it. At about what date I cannot say offhand. It was the latter part of 1928. He did not explain the reason for the advis-

(Testimony of Mrs. Hope C. Neaves.)

ability of the sale. He just thought it would be better business for me to sell it, and I told him to sell it. He advised me immediately after the sale. I did not know at the time to whom the stock was being sold. I learned this afterwards. I did not have any understanding that I was going to buy the stock back at a later date. My father was 78 years old in 1928. I believe my father had other stock in the company. I understood at the time the sale was made that the stock had been sold. My brother handled a great many other transactions for me under power of attorney. He usually consulted me before making an important transaction on my account. I was not in Providence during any of the years immediately [28] before or after 1928. I have been out here nine years. I still have some securities back there and some here, but mostly there. My brother is still acting under his power of attorney and handling my affairs. There were two blocks of stock which I claim to have sold. The first block was 150 shares. This was the stock that I acquired by gift from my father in 1917. The stock which I sold in 1928 was reacquired by me in 1929 but I cannot give the exact date. I think it was late in 1929. These transactions were all handled by my brother in Providence, Rhode Island. The sale of the stock took place on December 18, 1928. I first learned that the sale had taken place shortly after that. It was in 1928 that I learned this. My brother advised me of the sale by letter. He told me

(Testimony of Mrs. Hope C. Neaves.)

he was going to sell the stock but I did not know at the time to whom he was going to sell it. My father was connected with the corporation by which the stock was issued. I cannot give the exact date when the stock was reacquired by me in 1929. It was late in the year I am sure, but I am not absolutely certain. The transactions were all carried on by correspondence between myself and my brother. I do not have that correspondence. I haven't anything but a personal letter.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue.

[Endorsed]: Lodged Dec. 14, 1934.

Approved and ordered filed this 21 day of Dec. 1934.

(s) ANNABEL MATTHEWS
Member.

[Endorsed]: Filed Dec. 21, 1934. [29]

[Title of Court and Cause.]

AMENDED PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceeding before the Board.

2. Pleadings before the Board.

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Findings of Fact.

Opinion and decision of the Board.

4. Respondent's motion for reconsideration and to vacate memorandum opinion and decision entered by Board.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Statement of evidence as settled or agreed upon.

7. Motion for enlargement of time to transmit and complete the record. [Not included in record.]

8. This amended praecipe, together with proof

of service of notice of filing amended praecipe and of service of copy of amended praecipe.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue, Counsel for Petioner on Review.

[Endorsed]: Filed Dec. 5, 1934. [30]

[Title of Court and Cause.]

NOTICE OF FILING AMENDED PRAECIPE FOR RECORD.

You are hereby notified that the Commissioner of Internal Revenue on the 5th day of December, 1934, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., an amended praecipe for record. A copy of this amended praecipe, as filed, is hereto attached and served upon you.

Dated this 5th day of December, 1934.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the amended praecipe for record, is hereby acknowledged this 8th day of December, 1934.

(Sgd) ALLEN SPIVOCK
Respondent on Review.

[Endorsed]: Filed Dec. 14, 1934. [31]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 31, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 4th day of Jan., 1935.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7736. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Hope C. Neaves, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 9, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7736

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOPE C. NEAVES, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
SEWALL KEY,
LUCIUS A. BUCK,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7736

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOPE C. NEAVES, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 15–18) which is unreported.

JURISDICTION

This case involves a deficiency in income taxes in the sum of $1,244.19 for the year 1928 (R. 15). This appeal is taken from a decision of the Board of Tax Appeals, promulgated May 16, 1934 (R. 18–19), and an order entered July 26, 1934 (R. 21),

denying a motion for reconsideration and to vacate the decision (R. 19–21). The case is brought to this Court by a petition for review filed October 12, 1934 (R. 28), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

In the latter part of the year 1928 taxpayer sold certain stock to her father. In May 1929 taxpayer repurchased the stock. The entire transaction was handled by her brother, who represented her under a power of attorney. Was the taxpayer entitled to a deductible loss on this transaction?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

The only witness in this case before the Board was the taxpayer (R. 30–33). The facts as found by the Board (R. 15–16) are substantially as follows: The Commissioner determined a deficiency in income tax against the taxpayer for the calendar year 1928 in the amount of $1,244.19. In her return for that year the taxpayer claimed a loss of $1,360 on the sale of common stock of United Wire & Supply Company, and a capital net loss of $8,455 on the sale of preferred stock of the same company.

These claimed losses were disallowed by the Commissioner, and the only question for decision is whether such disallowance was proper.

It appears that in 1928 taxpayer was the owner of 80 shares of common stock of United Wire & Supply Company, which had been acquired December 29, 1926, at a cost of $1,600, and 150 shares of preferred stock of said company acquired in 1917 by gift from her father which stock had a cost of $15,000. The taxpayer, a resident of California, kept the stock in a safe deposit box in Providence, Rhode Island, to which her brother, who acted for her in busines transactions under a power of attorney, had access. In the latter part of 1928 the taxpayer was advised by her brother to sell the 80 shares of common stock and 150 shares of preferred stock of United Wire & Supply Company, to which she assented, but she had no knowledge to whom the stock was to be sold. On December 18, 1928, taxpayer's said brother sold the stock to taxpayer's father, receiving therefor $240 for the 80 shares of common stock and $6,545 for the 150 shares of preferred stock, and said amounts were paid to taxpayer by check of her father in the amount of $6,785 and deposited to taxpayer's account in the Phenix National Bank of Providence, Rhode Island.

There was no agreement or understanding between taxpayer and any other person that she could or would purchase said stock or any part thereof,

and the said sale price of $6,785 represented the prevailing market price of the stocks at the time of said sale. The said stock so sold or similar stocks were reacquired by taxpayer in May 1929.

In her income-tax return for 1928 taxpayer claimed a loss of $1,360 on the sale of the 80 shares of common stock, and a capital net loss of $8,455 on the sale of the preferred stock, both of which claims the Commissioner disallowed on the ground that the transaction was not a bona fide sale.

SPECIFICATION OF ERRORS TO BE URGED

The Board of Tax Appeals erred in the following particulars:

1. In not finding and holding that the taxpayer was not entitled to a deductible loss on the alleged sale.

2. In not finding and holding that no *bona fide* sale was made.

3. In not finding and holding that the taxpayer's evidence was insufficient to overcome the *prima facie* presumption in favor of the Commissioner's determination.

4. In not approving and upholding the Commissioner's determination.

5. The assignments of error (R. 25–26) are hereby incorporated by reference in this brief as fully and completely as if set forth at this point *in haec verba*. The ensuing argument is intended to apply to each and every of said assignments jointly and severally.

SUMMARY OF ARGUMENT

In favor of the Commissioner's determination there existed a *prima facie* presumption as to its correctness. The taxpayer had the burden of overcoming this presumption with positive proof. In addition the taxpayer had an added burden of proof because, (a) she was claiming the benefit of a deduction provision of the Revenue Act; (b) the transaction was with members of her family; and (c) the stock was repurchased during the following tax year. The taxpayer's evidence is wholly insufficient to carry her burden of proof. She did not call her brother, who handled the transaction, as a witness, nor did she excuse or explain her failure to do so. She did not call her father, who purchased the stock and later resold it to her, as a witness, nor did she excuse or explain her failure to do so. The taxpayer's own testimony does not show any reason for the sale and repurchase, and does not show the *bona fides* thereof.

ARGUMENT

There exists in favor of the Commissioner's determination a *prima facie* presumption of correctness. *Wickwire* v. *Reinecke,* 275 U. S. 101, 105; *Burnet* v. *Houston,* 283 U. S. 223, 227; *Green's Advertising Agency* v. *Blair,* 31 F. (2d) 96, 98 (C. C. A. 9th). The taxpayer's proof must be sufficient to overcome this presumption. In addition, in this case the taxpayer was claiming the benefit of a deduction. " * * * the burden is upon the

taxpayer to establish the amount of a deduction claimed." *Helvering* v. *Taylor,* 293 U. S. 507; *Burnet* v. *Houston, supra; Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371, 381. In *New Colonial Co.* v. *Helvering,* 292 U. S. 435, the Court said (p. 440):

> Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.
>
> * * * * *
>
> Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.

We respectfully submit that the taxpayer's evidence (R. 30–33) wholly fails to carry the burden of proof which rested upon her in this proceeding.

In the first place, this was entirely an intra-family transaction. The taxpayer resides in California (R. 15). The alleged sale was handled by taxpayer's brother in Providence, Rhode Island (R. 31, 32). The brother represented her under a power of attorney (R. 31) and apparently handles her affairs for her (R. 32). The sale was suggested by the brother (R. 31). The brother sold the stock on December 18, 1928 (R. 32). The purchaser was the taxpayer's father (R. 31–32). The taxpayer reacquired the stock in 1929; the brother handled the reacquisition (R. 32). The terms of reacquisition do not appear. It is the well-settled rule that transactions between persons so closely

related will be closely scrutinized. Cf. *Slayton* v. *Commissioner,* 76 F. (2d) 497 (C. C. A. 1st). As the Board has said, members of a family "must not play fast and loose with their respective properties to the prejudice of * * * taxes which they properly owe to the Government." *Fouke* v. *Commissioner,* 2 B. T. A. 219; *Schlossberg* v. *Commissioner,* 2 B. T. A. 683; *Hemenway* v. *Commissioner,* 11 B. T. A. 1311. The rule has been applied in close business relationships. Cf. *Rand* v. *Commissioner,* 77 F. (2d) 450 (C. C. A. 8th). The doctrine was applied by this Court to a transaction between directors and their corporation. *Wishon Watson Co.* v. *Commissioner,* 66 F. (2d) 52. Cf. *Commissioner* v. *Riggs* (C. C. A. 3d), decided July 18, 1935, not yet officially reported but may be found in C. C. H. 1935, Vol. 3–A, p. 10271.

Certainly, the rule, in its practical application, requires a full and frank disclosure of all of the details surrounding a tax transaction between a daughter and her father. Such a disclosure does not appear in this record. Here there is nothing more than the bare testimony that the sale was made practically at the end of the tax year and a reacquisition took place sometime during the following year (R. 30–32). The taxpayer assigns no reason for the sale and no reason for its repurchase. It is obvious that she entrusted the whole affair to her brother; she did not know why the sale was made because "He did not explain the reason for the advisability of the sale" (R. 31–32).

In the second place, the taxpayer's evidence is insufficient because she did not produce as a witness the one who handled the sale and reacquisiton for her. In *Slayton* v. *Commisioner, supra,* the court said (p. 499):

> Mrs. Slayton knew little about the business of the Hoyt Shoe Company, except as she was told by her husband. Her transfer of the stock was at his suggestion, and from her testimony he clearly acted as her agent in arranging for the transfer of the shares.

It is also clear that the brother had the power to sell and reacquire under the power of attorney. The facts suggest a plan of reacquisition at the time of sale. If the taxpayer's brother had an understanding for the repurchase of the stock at the time of sale, the case falls within Section 118 of the Revenue Act of 1928 and the loss cannot be recognized. Cf. *Commissioner* v. *Dyer,* 74 F. (2d) 685 (C. C. A. 2d). The brother was the taxpaper's most vital witness on this point; the father was the next most qualified witness. Neither of these witnesses were offered. This failure to produce vital testimony was after the Commissioner had ruled that the evidence adduced before him was insufficient (R. 9–10).

In the third place, the bare and unexplained facts of the transaction merely show a sale in December 1928 and a reacquisition the following year. Unexplained by other facts, the Commissioner is justified in asserting that the sale and reacquisition

was part of one transaction. The evidence merely shows a movement of taxpayer's stock from her to her father and back to her again. Insofar as the record shows no loss was actually sustained by the taxpayer on the whole transaction. Cf. *United States* v. *Flannery,* 268 U. S. 98. In *Shoenberg* v. *Commissioner,* 77 F. (2d) 446 (C. C. A. 8th), the court said (p. 449):

> The place of a sale in claiming a deduction is as evidence that a loss has been realized. If the sale is real and is an isolated transaction, it is conclusive proof. If it is only part of an entire plan, then the entire plan is examined to ascertain whether its effect is to produce a loss or a realized loss. * * *
>
> To secure a deduction, the statute requires that an actual loss be sustained. An actual loss is not sustained unless when the entire transaction is concluded the taxpayer is poorer to the extent of the loss claimed; in other words, he has that much less than before.
>
> A loss as to particular property is usually realized by a sale thereof for less than it cost. However, where such sale is made as part of a plan whereby substantially identical property is to be reacquired and that plan is carried out, the realization of loss is not genuine and substantial; it is not real. This is true because the taxpayer has not actually changed his position and is no poorer than before the sale. The particular sale may be real, but the entire transaction prevents the

loss from being actually suffered. Taxation is concerned with realities, and no loss is deductible which is not real.

Cf. *Esperson* v. *Commissioner,* 49 F. (2d) 259 (C. C. A. 5th), certiorari denied, 284 U. S. 658. The doctrine that a vendor must completely sever his ownership over property in order to realize a loss upon the sale thereof has long been the rule before the Board. *M. I. Stewart & Co.* v. *Commissioner,* 2 B. T. A. 737, 739.

CONCLUSION

We submit that the decision of the Board of Tax Appeals is clearly erroneous and should be reversed.

Respectfully submitted.

FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
SEWALL KEY,
LUCIUS A. BUCK,
Special Assistants to the Attorney General.

OCTOBER 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 171. *Losses.*—Losses sustained by individuals during the taxable year and not compensated for by insurance or otherwise are fully deductible (except by nonresident aliens, see section 213 and article 1051) if—

(a) Incurred in a taxpayer's trade or business, or

(b) Incurred in any transaction entered into for profit, or

(c) Arising from fires, storms, shipwreck, or other casualty, or theft.

Losses sustained by corporations during the taxable year and not compensated for by insurance or otherwise are deductible.

Losses must usually be evidenced by closed and completed transactions. * * *

ART. 174. *Shrinkage in value of stocks.*— A person possessing stock of a corporation cannot deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis determined under section 113 may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made, as in the case of bad debts. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1935

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No. 7736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

HOPE C. NEAVES,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR RESPONDENT.

ALLEN SPIVOCK,
Russ Building, San Francisco,
Attorney for Respondent.

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No. 7736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

HOPE C. NEAVES,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The facts of this case are summarized on pages 2-4 of petitioner's brief, and the statement of evidence (R. 30-33) gives all of the testimony of the taxpayer, who was the only witness, so it would seem unnecessary to state them here again.

QUESTION PRESENTED.

The real question presented here is not clearly stated by petitioner on page 2 of his brief. While the ultimate question is whether or not the respondent taxpayer is entitled to a deductible loss in selling certain stocks, yet this really depends solely on whether

or not the taxpayer, within thirty days before or after said sale, had any contract or option to acquire substantially identical stocks. (See Revenue Act of 1928, Sec. 118, Petitioner's Brief, page 12.) If the taxpayer had no such contract to acquire identical stocks within thirty days before or after said sale, she is obviously entitled to the loss deduction.

It happens that the taxpayer here acquired similar stocks some *five months* later, after her sale, and therefore, the *sole* question raised by the Commissioner in denying her a deductible loss was her *bona fide* in making the sale. (See R. 10, 24, and Petitioner's Brief, page 4.)

The answer to the entire question here is readily found in the taxpayer's uncontradicted testimony as follows: "I did not have any understanding that I was going to buy the stock back at a later date." (R. 32 and see also R. 16 and Petitioner's Brief, page 3.)

SPECIFICATION OF ERRORS.

Altho petitioner, on page 4 of his brief, specifies five alleged errors of the Board of Tax Appeals in allowing the taxpayer to deduct her loss, it seems apparent that petitioner on this appeal is relying only on number 2, which claims that the sale was not *bona fide,* and number 3, which claims that the taxpayer's evidence was insufficient to overcome the *prima facie* presumption in favor of the Commissioner's determination.

The petitioner refers to several other assignments of error (R. 25-26) dealing with the original cost of the stocks, but since this question was never really in issue, as plainly appears from the Commissioner's letter denying the deduction (R. 10), and the opinion of the Board. (R. 16.) Also, inasmuch as petitioner plainly admits the cost in his statement near the top of page 3 of his brief, it would seem unnecessary to go into this point at all. The findings of the Board (R. 15) show plainly what the cost was, because the cost was never questioned but was admitted by the Commissioner during the hearing, as satisfactory evidence had been presented to him prior thereto.

SUMMARY OF PETITIONER'S ARGUMENT AND STATEMENT OF RESPONDENT'S POSITION.

Petitioner argues that a *prima facie* presumption existed as to the correctness of the Commissioner's determination. Respondent's answer to this is simply that whatever presumption existed has been fully overcome by the taxpayer's direct and uncontradicted testimony. It should be noted that *prima facie* presumption does not mean *conclusive* presumption.

Petitioner further argues that respondent taxpayer had the burden of proof in claiming a deduction. Respondent's answer to this is simply that she not only sustained the burden of proof, but offered *all of the proof without the slightest contradiction.* The taxpayer was the only witness before the Board.

In endeavoring to show that the taxpayer did not sustain the burden of proof, petitioner alleges:

1. That the transaction was entirely intra-family;

2. That the taxpayer did not call her father and brother as corroborating witnesses; and

3. That the taxpayer does not show any reason for the sale and subsequent repurchase.

While each of the above points can and will be answered, it is the respondent's contention that inasmuch as the Commissioner is questioning the *bona fide* of the taxpayer in making the sale, he is charging her with fraudulent intent to evade a tax and, therefore, the burden of proof shifts to him under Revenue Act of 1928, Sec. 601. (See page 6 herein.)

The final answer to all of petitioner's points is that he is seeking a review here solely upon a question of fact, and the Circuit Court and Supreme Court have repeatedly held that the Board of Tax Appeals' decision on a question of fact, if supported by any substantial evidence, will not be disturbed on appeal.

ARGUMENT.

A. PRIMA FACIE PRESUMPTION IN FAVOR OF COMMISSIONER.

Petitioner cites numerous cases holding that a *prima facie* presumption exists in favor of the Commissioner's determination. However, this presump-

tion is merely *prima facie* and not *conclusive,* and any substantial evidence is sufficient to overcome a *prima facie* presumption. It is submitted that the taxpayer's direct and uncontradicted testimony to the effect that "there was no agreement or understanding between taxpayer and any other person that she could or would purchase said stock or any part thereof" (Petitioner's Brief, page 3; see also R. 32) is amply sufficient to overcome any *prima facie* presumption here.

B. BURDEN OF PROOF. FRAUD.

Petitioner lays great stress on his contention that the burden of proof to show that the sale of the stocks by taxpayer was *bona fide* is upon her. Conceding (for the moment only) that this is true, how can it be said that the burden of proof was not sustained by the taxpayer when she testified directly that at the time of the sale she had no agreement to repurchase, and her testimony was not refuted in the slightest degree, although she was fully cross-examined by the Commissioner's counsel?

However, petitioner is mistaken about the burden of proof being upon the taxpayer. He is questioning the taxpayer's *bona fide* and claiming *fraud* on her part in evading taxes and, therefore, the burden of proof shifts to him as the statute and authorities below indicate.

Wishon Watson Co. v. Commissioner, 66 F. (2d) 52 (C. C. A. 9) (1933), states on page 54:

> "Revenue Act of 1928, Sec. 601, 45 Stat. 872 (26 U.S.C.A. Sec. 1219), is as follows: 'In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner.' " (Citing cases.)

The above case cites *Budd v. Commissioner,* 43 F. (2d) 509 (C. C. A. 3), which reversed the Board of Tax Appeals because it decided that the burden to show no fraud was upon the taxpayer. On page 512, the Court said:

> "There must be something more than mere suspicion. * * * It is a general principle that fraud is never to be presumed, and he who avers it, takes upon himself the burden of proving it * * * *fraud cannot be inferred by the Court or jury from acts, legal in themselves and consistent with an honest purpose."* (Italics supplied.)

Also in *Marshall v. Commissioner,* 57 F. (2d) 633 (C. C. A. 6) (1932), the Court said on page 634:

> "There was nothing unlawful, or even mildly unethical, in the motive of petitioner, to avoid some portion of the burden of taxation. There is nothing illegal in the gift of shares of stock by a husband to his wife. If the transfer were attacked as fraudulent, the burden would be upon the Commissioner to establish such fraud by a clear preponderance of the evidence. Tappan et al. v. Commissioner, 41 F. (2d) 454 (C. C. A. 6); Budd v. Commissioner, 43 F. (2d) 509 (C. C. A. 3.)"

In view of the above it would seem idle to make further answer to petitioner's contentions about the burden of proof. However, a brief reply will be made to show they are without any merit.

1. INTRA-FAMILY SALE.

Petitioner is suspicious because the sale of stock by taxpayer was made to her father. Suspicion is never proof of fraud (*Budd v. Commissioner,* supra), and here the suspicion is even groundless, because there is no evidence whatever to justify it. Sales of stock between members of a family have been repeatedly held to be proper in claiming a deductible loss, as long as the seller divests himself of all title and has no understanding within thirty days before or after the sale to repurchase.

Sales between husband and wife have been upheld in allowing loss deductions on income tax in the following cases:

Peters v. Commissioner, 28 B. T. A. 976 (1933);

Burton v. Commissioner, 28 B. T. A. 1242 (1933);

Gummey v. Commissioner, 27 B. T. A. 1158 (1933);

Uihlein v. Commissioner, 30 B. T. A. 399.

Sales between brothers have been similarly upheld in the following cases:

Griffin v. Commissioner, 7 B. T. A. 1094;

Kurtz v. Commissioner, 8 B. T. A. 679;

Larsh v. Commissioner, 6 B. T. A. 1086.

A sale between parent and child was similarly upheld in the case of

Frank v. Commissioner, 27 B. T. A. 1158 (1933).

A sale between law partners was similarly upheld in the case of

Britain v. Commissioner, 20 B. T. A. 127.

In many of the above cases the seller repurchased the same stock some short time later, but this did not affect the *bona fide* of the original sale.

Each of the cases cited by petitioner on page 7 of his brief can be readily distinguished from the facts of the present case. For example, in the case of *Slayton v. Commissioner,* the husband acted as agent of his wife in selling and arranging a repurchase of the stock by their son within two weeks after the sale. In *Fouke v. Commissioner* there was an instantaneous redelivery of stock by the wife to the husband and other circumstances showing no *bona fide.* In *Schlossberg v. Commissioner,* 2 B. T. A. 683, the Board said on page 686:

> "* * * evidence adduced by taxpayer * * * is conflicting and unconvincing * * *"

Similar distinctions appear in all the other cases cited by petitioner and obviously they cannot apply here.

A possible hint as to why the Commissioner has suspected this sale by the taxpayer to her father and why this appeal has been taken may be gathered from the erroneous statement in the Commissioner's letter

(R. 9), where he states: "It is shown that your *father* had power of attorney * * *" (Italics supplied.) It is the *brother* who had the power of attorney. (R. 31-32.)

2. CORROBORATING WITNESSES NOT CALLED.

Petitioner indulges in further suspicion because the taxpayer alone testified and she did not call her brother or her father. The taxpayer lived in Beverly Hills, California, and the hearing before the Board was held at Long Beach, California. Her brother and father reside in Providence, Rhode Island. (R. 31-32.) The amount involved here is but $1200.00. It would have meant considerable expense for her brother and father to make a round trip from one end of the continent to the other.

Besides, does the taxpayer have to assume that her direct and fully uncontradicted statements under oath are not entitled to any credence? Her testimony was the *best evidence* which could be offered as she knew better than anyone else whether or not she contracted to repurchase the stock when she made the sale. The testimony of her brother and father would be merely *corroborative* of the fact that the sale was a completed transaction. The sum of $6735.00, which was the fair market value of the stocks, was paid by the father to the taxpayer and the cancelled check was offered in evidence. (R. 31.) Where is there any evidence to the contrary? The petitioner is indulging in wild speculations and assumptions of fraudulent intent without any evidence to substantiate them.

Furthermore, there was no demand made by the Commissioner before the Board that her brother and father be called and the question is raised here on appeal for the first time. Therefore, under the well established rules, this point should not be even considered here.

3. MOTIVE FOR SALE.

Continuing his suspicious attitude, petitioner contends there is no reason shown for the sale and subsequent repurchase. At the bottom of page 7 of petitioner's brief he quotes the taxpayer's testimony from R. 31-32 as follows: "He did not explain the reason for the advisability of the sale."

However, he carefully omits the sentence which immediately follows: "He thought it would be better business for me to sell it, and I told him to sell it."

The motive for the sale was apparently to secure a tax reduction and the taxpayer's legal right to do this cannot be questioned, as will be shown.

On page 9 of petitioner's brief he cites *Shoenberg v. Commissioner,* 77 F. (2d) 446, and quotes from page 449. However, he was very careful to omit the following, which also appears on page 449:

> "It is immaterial that the motive prompting the sale or the plan of which the sale was a part was to secure a deduction * * *
>
> Two very recent cases, *Commissioner v. Dyer,* 74 F. (2d) 685, and *Marston v. Commissioner,* 75 F. (2d) 936, in the Second Circuit, taken together, reveal the rule as to sales and repurchases. In the Dyer case there were sales and

repurchases, both parts of an original entire plan, and the claimed deductions were denied. In the Marston case there was a sale with no intention or plan to repurchase, but there was a later repurchase, and the claimed deduction on account of the sale was allowed."

In *Commissioner v. Dyer*, 74 F. (2d) 685 (C. C. A. 2) (1935), which is referred to above, the Court said on page 686:

> "It is undoubtedly true that the motive inducing Mr. Dyer and his associates to 'sell and deliver' their stock to Elanco was to reduce taxes by claiming losses on the sales. This, however, despite the appellants' argument to the contrary, is not enough to condemn the transactions. Anyone is privileged to arrange his affairs so that his taxes shall be as low as the statute permits. *Helvering v. Gregory*, 69 F. (2d) 809, 810 (C. C. A. 2), affirmed 55 S. Ct. 266, 293 U. S. 465, Jan. 7, 1935 * * * (Citing further cases.)"

In *Gregory v. Helvering*, 293 U. S. 465 (1934), which is referred to above, the Court said on page 469:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means of which the law permits, cannot be doubted. (Citing cases.)"

The above should put an end to the unwarranted suspicions of the Commissioner as the taxpayer here was apparently doing only what she had a clear legal right to do.

The opinion of the Board (R. 17) cites *Commissioner v. Hale,* 67 F. (2d) 561, 563, which similarly holds that a sale for the purpose of securing a tax reduction is valid where the sale is *bona fide* and cites *Wiggin v. Commissioner,* 46 F. (2d) 743, 745-6, and *Bullen v. State of Wisconsin,* 240 U. S. 625.

C. FINDINGS OF BOARD NOT REVIEWABLE ON APPEAL.

1. ANY SUBSTANTIAL EVIDENCE SUFFICIENT TO AFFIRM BOARD.

It has been repeatedly held that the findings of fact of the Board of Tax Appeals will not be disturbed on appeal if there is any substantial evidence to support them. Here the findings of the Board clearly and definitely show the *bona fide* of the taxpayer. (R. 15-18.)

In *Commissioner v. Gerard,* 75 F. (2d) 542 (C. C. A. 9) (1935), this Court said on page 544:

> "* * * if the findings of the Board are supported by any substantial evidence, they are conclusive and will not be disturbed. Phillips v. Commissioner, 283 U. S. 589, 599 * * * (Citing other cases.)"

Other cases along the same line are:

First Seattle National Bank v. Commissioner, 77 F. (2d) 45 (C. C. A. 9) (1935);

Gordon v. Commissioner, 75 F. (2d) 429 (C. C. A. 9) (1935);

Helvering v. Rankin, 55 S. Crt. 732 (Apr. 1935);

Slayton v. Commissioner, 76 F. (2d) 497, 498 (C. C. A. 1) (1935).

2. UNCONTRADICTED EVIDENCE WILL NOT BE REVIEWED.

In *Randolph v. Commissioner,* 76 F. (2d) 472 (C. C. A. 8) (1935), the Court said on page 476:

> "And even though the evidence before the Board is undisputed, the finding of the Board will not be disturbed by this court if different inferences may be reasonably drawn from such evidence. *Helvering v. Ames* (C. C. A. 8) 71 F. (2d) 939, 943."

Other cases in full accord with the above are:

Wilson v. Commissioner, 76 F. (2d) 476, 478 (C. C. A. 10) (1935);

Brown v. Commissioner, 74 F. (2d) 281, 282 (C. C. A. 10) (1934).

CONCLUSION.

The evidence clearly shows a *bona fide* sale by the taxpayer, apparently prompted by the legal motive to reduce her taxes. Furthermore, the petitioner fully cross-examined the taxpayer at the hearing before the Board and *offered no evidence or any objections whatever,* and on this appeal cannot now question the findings of the Board of Tax Appeals.

As regards the burden of proof, it was sustained by the taxpayer even though it was really upon petitioner, since he was claiming fraud.

It is submitted that the Board's decision should be affirmed.

Dated, San Francisco,
November 8, 1935.

Respectfully submitted,
ALLEN SPIVOCK,
Attorney for Respondent.

No. 7739

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—2-11-35

No. 7739

United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

V. K. BUTLER, Jr., Esq.,

For Comm'r:

H. D. THOMAS, Esq.

Docket No. 55537

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1931

Apr. 6—Petition received and filed. Taxpayer notified. (Fee paid)

" 6—Copy of petition served on General Counsel.

" 28—Answer filed by General Counsel.

May 5—Copy of answer served on taxpayer. Circuit Calendar.

1933

Jul. 3—Hearing set for week of September 11, 1933 at San Francisco, Cal.

Sep. 19—Hearing had before Mr. Van Fossan on the merits. Submitted. Briefs due Nov. 5, 1933—no exchange.

Oct. 16—Transcript of hearing of Sept. 19, 1933 filed.

1933

Nov. 1—Motion for extension to 12/5/33 to file brief filed by taxpayer. 11/2/33 granted.

Dec. 2—Motion for extension to 12/26/33 to file brief filed by General Counsel. 12/5/33 granted both sides.

" 22—Motion for extension to 1/8/34 to file brief filed by taxpayer. 12/26/33 granted.

" 26—Memorandum brief filed by General Counsel.

1934

Jan. 8—Brief filed by taxpayer.

Apr. 27—Opinion rendered, Mr. Van Fossan, Div. 9. Decision will be entered under Rule 50.

Jun. 26—Notice of settlement filed by General Counsel.

" 28—Hearing set July 18, 1934 on settlement.

Jul. 16—Consent to settlement filed by taxpayer.

" 23—Decision entered, Div. 9, Mr. Van Fossan.

Oct. 9—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

" 25—Proof of service filed. (2) Taxpayer and attorney.

Dec. 4—Motion to extend time to 2/8/35 to complete the record filed by General Counsel.

" 4—Order enlarging time to 2/8/35 for preparation of evidence and delivery of record entered.

" 28—Agreed statement of evidence lodged.

1934

Dec. 28—Praecipe filed—proof of service thereon.

" 31—Agreed statement of evidence approved and ordered filed. [1*]

APPEARANCES

For Taxpayer:

V. K. BUTLER, Jr., Esq.,

For Comm'r:

H. D. THOMAS, Esq.

Docket No. 60699

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1931

Nov. 30—Petition received and filed. Taxpayer notified. (Fee paid)

" 30—Copy of petition served on General Consel.

Dec. 32—Answer filed by General Counsel.

" 28—Copy of answer served on taxpayer. Circuit Calendar.

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1933

Jul. 3—Hearing set for week of Sept. 11, 1933 at San Francisco, Calif.

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United States Board of Tax Appeals

Docket No. 55537

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing the bureau symbols IT:AR:E-6 AHB-60D) dated February 5, 1931, and as a basis for this proceeding alleges as follows:

a. The petitioner is a national banking association organized and existing under and by virtue of the National Bank Act of the United States, with its principal banking offices located at 400 California Street, San Francisco, California.

b. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A"), was mailed to the petitioner on February 5, 1931.

c. The taxes in controversy are income taxes for the [3] calendar year 1928 and the amount of the deficiency claimed is $2,439.76. The amount of the tax in controversy (as nearly as may be determined) is the said amount of said deficiency, to wit, $2,439.76.

d. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The Commissioner of Internal Revenue erred in including in petitioner's taxable income interest in the amount of $20,331.40 accrued to petitioner on tax exempt securities during the taxable year herein involved.

e. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(1) Petitioner purchased from R. H. Moulton & Company certain state, federal and municipal bonds and other securities, all of which were of the classes, interest upon which is totally exempt from taxation, under the provisions of the Federal Revenue Act of 1928, and particularly under

the provisions of subdivision (b) of section 22 thereof. Said R. H. Moulton & Company executed agreements to repurchase said securities, each of which agreements was substantially in the form of the agreement attached hereto, made a part hereof, and marked Exhibit "B". [4]

Each of said agreements of repurchase fixed the repurchase price of the security, made up of the principal amount specified, and the accrued interest, at the coupon rate, to be paid by said R. H. Moulton & Company if repurchase of said securities were made. Each of said agreements of repurchase further specified that maturing interest coupons were to be the property of petitioner. All coupons for interest upon said securities maturing after the date of purchase of the said securities by petitioner and prior to the date of repurchase thereof by said R. H. Moulton & Company were clipped from said securities and cashed by petitioner, and none of said coupons or interest was ever delivered to, credited to, or paid to said R. H. Moulton & Company. During the taxable year herein involved petitioner regularly employed in keeping its books and in reporting its taxable income the accrual method of accounting. During the taxable year herein involved $20,331.40 of interest on said tax exempt securities accrued to petitioner, being all of the interest accrued on said securities during the period of their ownership in said year by petitioner, namely, from and after the purchase thereof by petitioner and prior to the repurchase by said R. H.

Moulton & Company of such of said securities as were repurchased.

Petitioner held legal title to said securities and the interest coupons thereon at all times between the dates of sale and repurchase thereof. If the right of resale and repurchase were not exercised in any particular case, petitioner would be and remain the unqualified and absolute owner of the [5] securities involved, not as pledgee foreclosing a lien, but on account of the title acquired by it at the time of purchase. Said R. H. Moulton & Company had no right to substitute other bonds of equal value for those purchased by petitioner and was not required to pay any interest upon the amounts paid by petitioner on account of the purchase of said securities nor to pay a stated rate of interest thereon regardless of the coupon rate or maturity or market value of said securities, nor to pay any interest whatever, other than the accrued interest on said securities at the date of repurchase thereof, computed in the same manner as is customary in all transactions for the purchase and sale of bonds. No relationship of borrower or lender ever existed between petitioner and R. H. Moulton & Company during the taxable year herein involved with respect to the transactions herein involved.

Petitioner alleges on information and belief that the said interest in the amount of $20,331.40 accrued to petitioner on said securities during the taxable year herein involved is exempt from tax under the provisions of the Federal Revenue Act of 1928, and

particularly under the provisions of subdivision (b) of section 22 thereof.

Wherefore, your petitioner prays that this Board may hear the proceeding and redetermine the deficiency in accordance with the facts herein alleged, and for such other relief as to this Board may seem proper.

V. K. BUTLER, JR.,
FELIX T. SMITH,
Counsel for Petitioner. [6]

State of California,
City and County of San Francisco.—ss.

Wm. R. Pentz, being duly sworn, deposes and says: That he is an officer, to-wit, the Vice President of THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, the petitioner named in the foregoing petition, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

WM. R. PENTZ

Subscribed and sworn to before me this 31st day of March, 1931.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [7]

EXHIBIT "A"

NP-2-28

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to

Feb 5 1931

The Bank of California, N. A.,
400 California Street,
San Francisco, California.

Sirs:

You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $2,439.76 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this

agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By W. T. SHERWOOD

Acting Deputy Commissioner.

Enclosures:

Statement

Form 882

Form 870

Schedules 1 to 5, inclusive. [8]

STATEMENT

IT:AR:E-6
AHB-60D

Returns Examined

Parent Company	Year	Form
The Bank of California, N. A., San Francisco, California	1928	1120 (Consolidated return)
Subsidiary Companies		
The San Francisco and Fresno Land Company, San Francisco, California.	1928	1122
Inland Irrigation Company, Tacoma, Washington.	1928	1122
Port Walter Herring and Packing Company, Seattle, Washington,	1928	1122

Tax Liability

The Bank of California, N. A.

Year—1928
Tax Liability—$95,246.86
Tax Assessed—$92,807.10
Deficiency—$2,439.76

The adjustments producing the result stated above are based on a revenue agent's report, and are explained in the attached schedules 1 to 5, inclusive.

The consolidated tax assessed and corrected tax liability have been allocated to the various companies on the basis of the net income properly as-

signable to each as provided in section 142(b) of the Revenue Act of 1928, and results in the allocation of the entire deficiency to your company. See schedules 3, 4 and 5.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1928 the Bureau will be unable to afford you an opportunity under the provisions of article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency. [9]

The Bank of California, N. A.
Year ended December 31, 1928

Schedule 1
Net Income

Net income as disclosed by return	$779,319.90
As corrected	799,651.30
Net adjustment	$ 20,331.40
Unallowable deductions and additional income:	
(a) Interest not reported	$20,331.40

Explanation of Items Changed

(a) In connection with the transactions whereby your corporation advanced to the Moulton and Company the value of certain municipal bonds upon the assignment of same to you, in which you were guaranteed against loss under a repurchase agreement, it is held by the Bureau

that such interest is taxable in accordance with the decisions in the cases of First National Bank of Wichita and Brown-Crummer Company, B. T. A. volume 19, #5, pages 745 and 750.

Schedule 2

Consolidated Net Income

Net income as corrected:	
The Bank of California, N. A.	$799,651.30
San Francisco and Fresno Land Company	182,070.08
Port Walter Herring and Packing Company	9,783.07
Total	$991,504.45
Net losses as corrected:	
Inland Irrigation Company, Incorporated	7,386.42
Consolidated net income	$984,118.03

Schedule 3

Computation of Tax

Income Tax

Consolidated net income	$984,118.03
Income tax at 12 per cent	$118,094.16
Less:	
Income taxes paid to a foreign country	2,188.69
Total tax assessable	$115,905.47

[10]

Schedule 4

Allocation of Tax Assessed on Consolidated Return Before Deducting Foreign Tax Credit.

Company	Income Reported	Per Cent	Amounts
The Bank of California, N. A.	$779,319.90	80.2452	$ 92,807.10
The San Francisco and Fresno Land Company	182,070.08	18.7474	21,682.19
Port Walter Herring and Packing Company	9,783.07	1.0074	1,165.11
Totals	$971,173.05	100	$115,654.40

Allocations of Corrected Tax Liability

Company	Income Reported	Per Cent	Amounts
The Bank of California, N. A.	$799,651.30	80.6533	$ 95,246.86
The San Francisco and Fresno Land Company	182,070.08	18.3601	21,682.19
Port Walter Herring and Packing Company	9,783.07	.9866	1,165.11
Totals	$991,504.45	100	$118,094.16

Schedule 5

Computation of Deficiency

The Bank of California, N. A.		
Correct tax liability		$ 95,246.86
Less:		
Income taxes paid to a foreign country		2,188.69
Balance of tax		$ 93,058.17
Tax previously assessed (account No. 400909)	$113,465.71	
Amount allocated to subsidiaries	22,847.30	90,618.41
Deficiency		$ 2,439.76

[11]

Schedule 5
(continued)
Computation of Deficiency
(continued)

The San Francisco and Fresno Land Company	
Correct tax liability	$21,682.19
Tax previously assessed	21,682.19
Deficiency	none
Port Walter Herring and Packing Company	
Correct tax liability	$1,165.11
Tax previously assessed	1,165.11
Deficiency	none

[12]

EXHIBIT "B"

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller", agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer", agrees to buy the following bonds, namely:

$45,000 CITY & COUNTY OF SAN FRANCISCO WATER 4½% BONDS

Numbers and denominations as follows:

$ 5,000	July 1, 1945	Nos. 25510/14
40,000	" 1, 1948	28162/4
		28168/92
		26603/4
		28126/35

The purchase price of each bond is as follows: (Plus accrued interest)

July 1, 1945 maturity @ 100
July 1, 1948 " @ 100

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 3rd day of January, 1928.

THE BANK OF CALIFORNIA, N. A.
A. H. Holley
Vice-President

R. H. MOULTON & COMPANY
By Elmer Booth

[Endorsed]: Filed April 6, 1931. [13]

[Title of Court and Cause—Docket No. 55537.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

a. Admits the allegations contained in paragraph a of the petition.

b. Admits the allegations contained in paragraph b of the petition.

c. Admits the allegations contained in paragraph c of the petition.

d. Denies that the respondent erred in the manner alleged in paragraph d of the petition.

e. Denies each and every allegation contained in paragraph e of the petition which is inconsistent with or contrary to the determination of the Commissioner as shown in the deficiency letter, a copy of which is attached to the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.
amm—4-27-31

[Endorsed]: Filed Apr. 28, 1931. [14]

[Title of Court and Cause—Docket No. 60699.]

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing the bureau symbols IT:AR: E-6 CEC-60D) dated October 30, 1931, and as a basis for this proceeding alleges as follows:

(a) The petitioner is a national banking association organized and existing under and by virtue of the National Bank Act of the United States, with its principal banking office located at 400 California Street, San Francisco, California.

(b) The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A"), was mailed to the petitioner on October 30, 1931.

(c) The taxes in controversy are income taxes for the [15] calendar year 1929 and the amount of the deficiency claimed is $1,620.52. The amount of the tax in controversy (as nearly as may be determined) is the said amount of said deficiency, to wit, $1,620.52.

(d) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner of Internal Revenue erred in including in petitioner's taxable income interest in the amount of $14,731.98 accrued to petitioner on tax exempt securities during the taxable year herein involved.

(e) The facts upon which the petitioner relies as a basis of this proceeding are as follows:

1. Petitioner purchased from R. H. Moulton & Company certain state, federal and municipal bonds and other securities, all of which were of the classes, interest upon which is totally exempt from taxation, under the provisions of the Federal Revenue Act of 1928, and particularly under the provisions of subdivision (b) of section 22 thereof. Said R. H. Moulton & Company executed agreements to repurchase said securities, each of which agreements was substantially in the form of the agreement attached hereto, made a part hereof, and marked Exhibit "B". Each of said agreements of repurchase fixed the repurchase price of the security, made up of the principal amount specified, and the accrued interest, at the coupon rate, to be paid by said R. H. Moulton & Company if repurchase of said securities were made. Each of said agreements [16] of repurchase further specified that maturing interest coupons were to be the property of petitioner. All coupons for interest upon said securities maturing after the date of purchase of the said securities by petitioner and prior to the date of repurchase thereof by said R. H. Moulton & Company were clipped from said securities and cashed by petitioner, and none of said coupons or interest was ever delivered to, credited to, or paid to said R. H. Moulton & Company. During the taxable year herein involved petitioner regularly employed in keeping its books and in reporting its taxable income the accrual method of accounting. During the taxable year herein involved $14,731.98 of interest on said tax exempt securities accrued to petitioner, being

all of the interest accrued on said securities during the period of their ownership in said year by petitioner, namely, from and after the purchase thereof by petitioner and prior to the repurchase by said R. H. Moulton & Company of such of said securities as were repurchased.

Petitioner held legal title to said securities and the interest coupons thereon at all times between the dates of sale and repurchase thereof. If the right of resale and repurchase were not exercised in any particular case, petitioner would be and remain the unqualified and absolute owner of the securities involved, not as pledgee foreclosing a lien, but on account of the title acquired by it at the time of purchase. Said R. H. Moulton & Company had no right to substitute other bonds of equal value for those purchased by petitioner and was [17] not required to pay any interest upon the amounts paid by petitioner on account of the purchase of said securities nor to pay a stated rate of interest thereon regardless of the coupon rate or maturity or market value of said securities, nor to pay any interest whatever, other than the accrued interest on said securities at the date of repurchase thereof, computed in the same manner as is customary in all transactions for the purchase and sale of bonds. No relationship of borrower or lender ever existed between petitioner and R. H. Moulton & Company during the taxable year herein involved with respect to the transactions herein involved.

Petitioner alleges on information and belief that the said interest in the amount of $14,731.98 accrued

to petitioner on said securities during the taxable year herein involved is exempt from tax under the provisions of the Federal Revenue Act of 1928, and particularly under the provisions of subdivision (b) of section 22 thereof.

Wherefore, your petitioner prays that this Board may hear the proceeding and redetermine the deficiency in accordance with the facts herein alleged, and for such other relief as to this Board may seem proper.

V. K. BUTLER, JR.,
FELIX T. SMITH,
Counsel for Petitioner. [18]

State of California,
City and County of San Francisco—ss.

WM. R. PENTZ, being duly sworn, deposes and says: That he is an officer, to-wit, the Vice President of THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, the petitioner named in the foregoing petition, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to the matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

WM. R. PENTZ.

Subscribed and sworn to before me this 24th day of November, 1931.

[Notarial Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [19]

EXHIBIT "A"

NP-2-C-29

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to

Oct. 30, 1931.

The Bank of California, N. A.
400 California Street,
San Francisco, California.

Sirs:

You are advised that the determination of your tax liability and that of your affiliated companies for the year(s) 1929 discloses a deficiency of $1,620.52 as shown in the statement which is attached to and made a part of this letter.

In accordance with section 272 of the Revenue Act of 1928 and Article 16 of Regulations 75 relating to consolidated returns of affiliated corporations prescribed under section 141(b) of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability and that of your affiliated companies.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the en-

closed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By J. C. Wilmer,

Deputy Commissioner.

Enclosures:

Statement

Form 882

Form 870-C-29

Schedules 1 to 7 inclusive [20]

STATEMENT

IT:AR:E-6
CEC-60D

Returns Examined

Parent Company	Form	Year
The Bank of California, N. A., San Francisco, California.	1120	1929
Subsidiary Companies:		
The San Francisco and Fresno Land Co., San Francisco, Calif.	1122	1929
Inland Irrigation Co., Inc., Tacoma, Washington.	1122	1929
Port Walter Herring and Packing Co., Seattle, Washington	1122	1929
Umptanum Sheep Company, Portland, Oregon	1122	*

*April 3, 1929 to December 31, 1929

Tax Liability

Tax liability of The Bank of California, N. A., and each subsidiary company above named as provided for in article 15(a) of Regulations 75 prescribed under section 141(b) of the Revenue Act of 1928.

Year—1929.

Tax Liability—$160,239.00.

Tax Assessed—$158,618.48.

Deficiency—$1,620.52.

In accordance with article 16(a) of Regulations 75, the deficiency will be assessed severally against each corporation named above.

The deficiency shown herein is based upon the report dated April 22, 1931 prepared by Revenue Agent, Hugh T. Fellers, and transmitted to you under date of May 11, 1931, which report is made a part hereof, and upon the adjustments as shown in the attached schedules numbered 1 to 7, inclusive. [21]

Due to the fact that the issue relative to the taxability of interest received in connection with municipal securities assigned to your corporation under repurchase agreements, was also an issue in the taxable year 1928 and a petition has been filed for that year with the United States Board of Tax Appeals, an opportunity has not been afforded you under the provisions of article 451 of Regulations 74, to discuss your case for 1929 before the mailing of a formal notice of determination as provided by section 272(a) of the Revenue Act of 1928. [22]

The Bank of California, N. A.

Year ended December 31, 1929

Schedule 1

Net Income

Net income as disclosed by return	$1,166,504.66
As corrected	1,181,236.64
Net adjustment	$ 14,731.98
Unallowable deduction and and additional income:	
(a) Exempt interest overstated	$ 14,731.98

Explanation of Items Changed

(a) In transactions whereby your corporation advanced funds to R. H. Moulton and Company to the value of certain municipal bonds upon the assignment of these bonds to you, it is held by the Bureau that interest received in connection therewith is taxable for the reason that you held these securities subject to a repurchase agreement. This is in accordance with the decision of the United States Board of Tax Appeals in the case of the First National Bank in Wichita v. Commissioner of Internal Revenue published in 19-B. T. A.-744.

Schedule 2

San Francisco and Fresno Land Co.

Net Income	
Net Income as disclosed by return	$308,080.55
As corrected	308,080.55
Net adjustment	None

Schedule 3

Inland Irrigation Company, Inc.

Net Income	
Net income as disclosed by return	$ 60.00
As corrected	60.00
Net adjustment	None

The Bank of California, N. A.

Year ended December 31, 1929.

Port Walter Herring and Packing Co.

Schedule 4

Net Income

Net income as disclosed by return	$29,903.82
As corrected	29,903.82
Net adjustment	None

Schedule 5

Umptanum Sheep Company.

Period April 3, 1929 to December 31, 1929.

Net Loss

Net loss as disclosed by return	$44,347.23
As corrected (loss)	44,347.23
Net adjustment	None

Schedule 6

Consolidated Net Income

Net income as corrected:	
The Bank of California, N. A.	$1,181,236.64
San Francisco and Fresno Land Co.	308,080.55
Inland Irrigation Company	60.00
Port Walter Herring and Packing Co.	29,903.82
Total	$1,519,281.01
Net loss as corrected:	
Umptanum Sheep Company	44,347.23
Consolidated net income	$1,474,935.78

[24]

The Bank of California, N. A.

Year ended December 31, 1929.

Schedule 7

Computation of Tax

Net income for taxable year	$1,474,935.78
Income at 11%	$ 162,242.72
Less: Taxes paid to a foreign country	2,003.72
Total tax assessable	$ 160,239.00
Tax previously assessed, account #430011	158,618.46
Deficiency	$ 1,620.52

[25]

EXHIBIT "B"

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller" agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer" agrees to buy the following bonds, namely:

$45,000 CITY & COUNTY OF SAN FRANCISCO WATER 4½% BONDS

Numbers and denominations as follows:

$ 5,000	July 1, 1945	Nos. 25510/14
40,000	" 1, 1948	28162/4
		28168/92
		26603/4
		28126/35

The purchase price of each bond is as follows: (Plus accrued interest)

July 1, 1945 maturity @ 100
July 1, 1948 " @ 100

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 3rd day of January, 1928.

THE BANK OF CALIFORNIA, N. A.
A. H. Holley
Vice-President
R. H. MOULTON & COMPANY
By Elmer Booth

[Endorsed]: Filed Nov. 30, 1931. [26]

[Title of Court and Cause—Docket No. 60699.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(a) Admits the allegations contained in paragraph (a) of petition.

(b) Admits the allegations contained in paragraph (b) of petition.

(c) Admits the taxes in controversy are income taxes for the calendar year 1929 and the amount of the deficiency claimed is $1,620.52. Denies the remaining allegations contained in paragraph (c) of petition.

(d)(1). Denies that the respondent erred in the manner alleged in paragraph (d)(1) of the petition.

(e)(1). Denies the material allegations of fact appearing in paragraph (e)(1) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the

increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Dec. 23, 1931. [27]

[Title of Court and Cause—Docket Nos. 55537, 60699.]

Promulgated April 27, 1934.

The evidence establishes that the transactions in question were actual purchases by taxpayer of tax-free securities as short-term investments and not loans with the securities as collateral, notwithstanding the fact that repurchase agreements were entered into at the time the securities were purchased by taxpayer. Accordingly, the coupon interest paid on such securities was properly received by taxpayer and taxpayer is exempt from tax on the same under section 22 (b) (4) of the Revenue Act of 1928.

V. K. Butler, Jr., Esq., for the petitioner.
H. D. Thomas, Esq., for the respondent.

OPINION.

VAN FOSSAN: These proceedings were brought to redetermine deficiencies in the income taxes of

the petitioner for the years 1928 and 1929 in the sums of $2,439.76 and $1,620.52, respectively.

The petitioner alleges that the respondent erred in including in its taxable income interest aggregating $20,331.40 and $14,731.98 accrued to the petitioner on tax-exempt securities during the years 1928 and 1929, respectively.

The petitioner is a national banking association, organized and existing under the National Bank Act of the United States, with its principal banking office in San Francisco, California. R. H. Moulton & Co. was engaged in the investment banking business in that city and specialized in municipal bonds. Practically all of the securities in which it dealt were tax-exempt.

During 1928 and 1929 the petitioner purchased from R. H. Moulton & Co. and other investment dealers certain tax-exempt state, Federal, and municipal bonds and obligations of other political subdivisions. The purchases were made either upon the application of the investment bankers, who held or had commitments for large blocks of bonds [28] which they could not carry themselves, or upon the request of the petitioner, which had available surplus funds desirable for use in obtaining short-term investments. The purchase price was based on, but usually under, the market price plus accrued interest to the date of sale at the coupon rate. Upon the payment of the agreed price, the securities were delivered to the petitioner under a bill or memorandum of sale. Simultaneously, the petitioner and the "seller" entered into the following standard

form of agreement (the blanks being filled in to constitute a typical case):

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller." agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer," agrees to buy the following bonds, namely:

$7,000 CITY OF HANFORD MUNICIPAL IMPROVEMENT 5% BONDS

Numbers and denominations as follows:

$2,000	Aug. 1,	1958	Nos.	173/74
4,000	"	1961	"	186/89
1,000	"	1963	"	199

The purchase price of each bond is as follows: (Plus accrued interest)

August 1,	1958	maturity	@ 95
"	1961	"	@ 95
"	1963	"	@ 95

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or

its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 11th day of July 1929.

THE BANK OF CALIFORNIA, N. A.
STUART F. SMITH
Vice-President.
R. H. MOULTON & COMPANY
[Signed] By ELMER BOOTH

The transactions under discussion were entered on the petitioner's books as a credit to the seller at the full amount of the purchase price plus accrued interest and were listed and carried in an account called "Bond Account No. 2," to facilitate their expeditious [29] handling. The petitioner treated its bonds held under the repurchase agreements exactly as it did all its bonds and other investments. Upon the maturity of a coupon attached to a bond it was collected by the petitioner and the proceeds

credited to the account "Interest on Investments" on its general ledger. In that account all interest from bonds of whatever nature owned by the petitioner was entered. In its call and semiannual statements the bonds subject to repurchase were included in its list of bonds and other investments owned by it. The long-term investments carried by the petitioner in its "Bond Account No. 1" and its short-term investments entered in its "Bond Account No. 2" were treated exactly alike from an accounting viewpoint. Likewise, the interest derived from both classes of investments was so treated. The practice was not challenged by the Comptroller of the Currency.

The sale price set in the repurchase agreement was always exactly the same as the original purchase price. The petitioner and the investment dealer adhered strictly to the terms of the repurchase agreement. No supplementary agreement was made to enlarge, modify, or in any way to affect the original agreement or the acts of the parties thereunder. If the bonds were not repurchased at the expiration of the period named in the agreement no extension was given, but occasionally an entirely new agreement was executed, accompanied by a new bill of sale at a price based on the current market. At times the petitioner did not agree to a new contract and the bonds would be repurchased by the dealer and sold to another bank. Often the investment banker repurchased at intervals portions of the bonds held by the petitioner under the repurchase agreement.

The yield to the petitioner under the repurchase agreements was less than that received from collateral loans. The petitioner often made loans to customers with tax-exempt securities as collateral.

The petitioner kept its books on the accrual basis.

The amount of interest in controversy, aggregating $20,331.40 and $14,731.98, respectively, during the years 1928 and 1929, was computed by adding the amount of the matured coupons actually cashed by the petitioner, the amount of the accrued interest received by it upon resale, and the amount of interest accrued on the bonds held by the petitioner at the close of the year, and subtracting therefrom the amount of accrued interest paid by the petitioner upon the original purchases from the investment dealers.

The petitioner contends that the transactions described constituted an outright sale from the investment dealers to it and that, hence, the interest accrued and received while the bonds were so owned [30] and held by it were exempt from taxation under section 22 (b) (4)[1] of the Revenue Act of

---

[1](b) Exclusions from gross income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:
* * * * * * * *

(4) Tax-free Interest—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. * * *

1928. The respondent's position is that, in substance, the transactions represented loans made by the petitioner to the dealers with the tax-exempt bonds hypothecated therefor and that, therefore, the interest on such bonds belonged to the dealers and not the petitioner. Consequent on this position respondent added the amounts of the interest to petitioner's income as interest received on loans.

In his brief respondent's counsel asks us to disregard entirely the form of the sale, the repurchase agreement, and the whole transaction and to read into it a "substance" consonant with his theory that it was merely a loan. To do so, we would be compelled not only to disregard the contractual relation established by documentary proof and the practical treatment of the interest received, but also to ignore the testimony of witnesses, some of whom were the respondent's own. It is true that from the Moulton Co.'s viewpoint the financial support of the petitioner was useful in obtaining and placing tax-free securities, such as municipal, district, county, and State bonds, but petitioner's primary object was plainly to benefit itself by securing an attractive investment for its idle funds. It is obvious that when a financial institution finds itself overburdened with an excessive amount of cash which it can not lend through ordinary channels, it must seek and obtain short-term investments which will yield some returns, usually at less than the current interest rate, yet will permit a prompt conversion into cash when needed. Such short-term

investments were bankers' acceptances, commercial paper, and tax-exempt securities. All were bought by the petitioner as it found opportunities so to do.

The respondent stresses the fact that the Moulton Co. could repurchase at any time and in any number of units the bonds transferred to the petitioner. We attach no particular significance to this privilege other than that it indicates the flexibility of the repurchase contract. However, the contract also contains this paragraph:

> In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer. [31]

Thus, whenever the petitioner needed to convert its short-term investment into cash for use in the normal course of business, it had the right to tender such bonds as it desired to resell and if the Moulton Co. were unable to purchase any or all of such bonds, petitioner could dispose of them on the market. This provision is inconsistent with the theory that the transaction was a loan.

Counsel for both the petitioner and the respondent rely on our decision in First Nat. Bank in Wichita, 19 B. T. A. 744; affd., 57 Fed. (2d) 7. A careful analysis of the facts of that case shows

clearly that it suppports the petitioner's position rather than that of the respondent. There we said:

> It seems clear that at the time the petitioner solicited this business from the Brown-Crummer Co. it had on hand a large surplus of unemployed funds and that that company was in the market for loans. The maximum amount of credit the petitioner could extend to this company by way of a direct loan, under the law, was $200,000; this credit it readily gave to the company upon its collateral note. The company, however, required amounts greatly in excess of this; and, since it was dealing in large issues of municipal securities which constituted approved banking investments, the sale with repurchase agreement was evolved and brought into play. The petitioner contends that through this process it acquired a complete title to these bonds which the repurchase agreement in no way impaired, and that, because of that fact, the interest payments were its income, and being tax-exempt, it was entitled to exclude them from its income-tax returns. We think there could be no question as to the soundness of the petitioner's contention had it taken title to these securities subject to no conditions other than is evidenced by the repurchase agreements; however, other established facts show that other considerations formed the motives of the parties to the transactions.
>
> The question here, as we view it, is not dependent upon who held the bare legal title to

the bonds during the dates of sale and repurchase, but rather upon the broader issue as to who, under the understanding between the bank and its customers, was entitled to receive, and who, as carried out, did receive the interest payments made by the issuing authorities of such bonds when collected and paid. The record shows that the true relationship between the petitioner and its customers, in these transactions, was that of a lender of money in consideration for the legal rate of interest payable on the amount advanced, and not that of an investor in the securities assigned to it by such customers. The history of these transactions and the manner in which they were carried out can lead to no other conclusion.

In reviewing the case, the Circuit Court of Appeals commented thus:

> There is no doubt of the exemption from income taxes of the interest on these securities in favor of the person or persons who were entitled to receive it and did receive it. So, the issue is one of fact.
>
> * * * * * * *
>
> It is contended that the written contract made by the parties when the bonds were delivered passed legal title to the bonds in the bank, and by force thereof interest on them was the bank's property. There is no doubt that the [32] form of contract might have been carried out in that way, but the blanks in the contract submitted

> to the comptroller left an opportunity to the bank of which it availed itself, and the practice as carried on by the parties clearly shows that it was never intended that the bank should be entitled to the interest accruing on the bonds. Conceding that under the contract the legal title to the bonds was in the bank, the uniform conduct and practice of the parties was a joint admission that the interest coupons and their proceeds when collected did not belong to the bank, but were the property of Brown-Crummer Company. They were collected by Brown-Crummer Company and applied to its use and benefit.
>
> * * * * * * *
>
> * * * The bank got none of the interest that accrued on the bonds. It was not entitled to it. Brown-Crummer Company paid the bank all its interest charges.

The facts in the cited case are very different from those in the case at bar. There the bank paid par, not market value, for the bonds, and was guaranteed against loss. The interest was the current loan rate—not the coupon rate. There, upon the maturity of the interest coupon, the bank clipped the coupon and delivered it to its customer; here, the petitioner collected the coupon and credited the proceeds thereof to its own interest account. In the Wichita case the customer made monthly interest adjustments on its loans without reference to the coupons collected or interest due from the tax-exempt securities. In the instant case no such

method was employed. There, unlimited withdrawals and substitutions of bonds were permitted and made. Here, the same securities were made the subject of resale and no substitutions, withdrawals, or renewals were contemplated or allowed.

Furthermore, in the repurchase contract under consideration the petitioner was not required to account to the Moulton Co. for any surplus upon a sale, but could hold that company for any deficiency. Under California law the petitioner would be required to account for the surplus from the sale of collateral or under a chattel mortgage. (Code of Civil Procedure, sec. 3008.)

Moreover, the record shows that no special considerations or conditions other than those set forth in the contract motivated the actions of the parties. In this respect the case at bar differs basically from the First Nat. Bank in Wichita case. As we view the repurchase agreement, it granted to the Moulton Co. the right to purchase upon stated terms certain securities which were the property of the petitioner and to which petitioner had title. At most, the agreement might have restricted petitioner's ability to sell to a third person with knowledge, but that possibility could have no effect on its ownership of the property. The right to collect the interest coupons and the benefit of the accrued interest on the bonds were [33] natural incidents to that ownership. The treatment of interest by the parties is corroborative of this conclusion.

There is no evidence that the repurchase plan was a device contrived for the purpose of tax eva-

sion or even tax avoidance. On the contrary, the record indicates that the arrangement was a well established custom in San Francisco banking circles, resulting from the bank's need to put its surplus funds to work, but in such form as to be liquid and constantly available.

In view of the facts in the case before us, we are of the opinion that the tax-free securities belonged to petitioner and that the interest received by and accrued to the petitioner from such securities as were covered by the repurchase agreements as above set forth is exempt from taxation under the provisions of section 22 (b) (4) of the Revenue Act of 1928.

Reviewed by the Board.

Decision will be entered under Rule 50.

TRAMMELL dissents. [34]

United States Board of Tax Appeals
Washington

Docket Nos. 55537, 60699

THE BANK OF CALIFORNIA,
NATIONAL ASSOCIATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the opinion of the Board promulgated April 27, 1934, the respondent herein on

June 26, 1934, having filed a notice of settlement and proposed computation and the petitioner having on July 16, 1934, filed an acquiescence in the computation as made by the respondent, now therefore, it is

ORDERED and DECIDED: That there are no deficiencies in Federal income tax due for the years 1928 and 1929.

[Seal] (s) ERNEST H. VAN FOSSAN,
Member.

Entered, July 23, 1934. [35]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Harold D. Thomas, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his

office by virtue of the laws of the United States. That the respondent on review (hereinafter referred to as the taxpayer) is a national banking association, organized and existing under the National Bank Act of the United States, with its principal office in San Francisco, California, and filed its Federal income tax returns for the years 1928 and 1929 involved herein with the Collector of Internal Revenue for the First District of California at San Francisco, California, and the office of said Collector [36] is located within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

That the nature of the controversy is as follows, to wit:

In 1928 and 1929 the taxpayer, under and by virtue of agreements hereinafter described, received interest in the amounts of $20,331.40 and $14,731.98 respectively. These amounts were not reported as taxable income by the taxpayer on its income tax returns for said years. R. H. Moulton and Company and other investment dealers purchased, at market, tax-exempt securities from outside parties. Upon the purchase of such securities they immediately went through the form of selling same to the taxpayer and the taxpayer at the same time and as part of the same transaction entered into a contract, designated "repurchase agreement" to resell the same identical securities to R. H. Moulton & Company and the other investment dealers at the end of ninety days or at any time within ninety days

if the latter so desired. All of these transactions in 1928 and 1929, with the exception of a few, were with one investment dealer, R. H. Moulton & Company, and these two were precisely along the same lines as the others.

The price at which the securities were taken over by the taxpayer was usually 1 to 5 points under the market price. The figure at which R. H. Moulton & Company was to take back the securities from the taxpayer was always the same price, at which the taxpayer had acquired the securities. R. H. Moulton & Company, at its option, could take back the securities before the expiration of the ninety day period and was also privileged to reacquire any portion thereof from time to time within the ninety days. [37]

By means of these transactions the taxpayer very frequently furnished the money to R. H. Moulton & Company to make the original purchase of the tax-exempt securities. In many instances R. H. Moulton & Company sold to its customers a portion of the securities held by the taxpayer under repurchase agreements and would exercise the repurchase agreement to the extent of obtaining such portion of said securities necessary for making delivery to the customer.

In case R. H. Moulton & Company failed to take up the securities by the end of the ninety day period, the taxpayer could sell the same for the best price obtainable and charge the loss, if any, to the account of the former. The securities held by the taxpayer by virtue of these transactions were carried by R. H.

Moulton & Company on its books as its own assets and the obligations under the repurchase agreements as its liabilities. The taxpayer in its loans on collateral to any one firm or person was limited by the banking laws to 10% of its capital and surplus and it was believed by the taxpayer that by reason of these transactions it could advance or place more funds with the investment dealers than it could by outright loans to them on collateral.

As consideration for its part in furnishing money for these transactions the taxpayer was permitted to collect the interest coupons on the securities while it was in possession of same. This interest amounted to $20,331.40 and $14,731.98 for 1928 and 1929, respectively, after making adjustment for accrued interest both at the time of the so-called purchase and repurchase and for accrued interest at the close of the year. The Commissioner in determining the deficiencies included the above amounts of interest in taxpayer's taxable net income for the years 1928 and 1929. [38]

III.

That the taxpayer appealed from said determination of the Commissioner to the United States Board of Tax Appeals; that the Board held that such interest was tax-exempt income and should not be included in the taxpayer's income for the year 1928 or the year 1929; that the Board ordered and decided that there were no deficiencies in tax for 1928 and 1929; that the Board's findings of fact and opinion were promulgated April 27, 1934,

and its final order of redetermination adjudging that there were no deficiencies in tax, was entered July 23, 1934.

IV.

That the Commissioner, being aggrieved by the findings and conclusions made by the Board in its said report and also by said order of redetermination desires to obtain a review of said report and order by the United States Circuit Court of Appeals for the Ninth Circuit and as reasons for such a review he alleges that the Board in rendering its findings of fact and opinion and in entering its final order of redetermination committed the following errors:

1. The Board erred in holding that the interest received by the taxpayer was exempt from taxation.

2. The Board erred in failing to hold that the interest received by the taxpayer was taxable to it.

3. The Board erred in failing to find and hold that the interest in question was received by the taxpayer on loans to customers.

4. The Board erred in finding and holding that the taxpayer received the interest in question as the owner of tax exempt securities.

5. The Board erred in holding that the securities in question were purchased by the taxpayer. [39]

6. The Board erred in finding that the taxpayer treated the bonds held under the repurchase agreement as it did all its bonds and other investments.

7. The Board erred in failing to find that the repurchase agreements were always carried out.

8. The Board erred in finding and holding that the taxpayer was not required to account to the Moulton Company for any surplus on a sale.

9. The Board erred in finding that no special considerations or conditions other than those set forth in the contract motivated the actions of the parties.

10. The Board erred in failing to find that the transactions in the form of sales and repurchases of the securities in question were occasioned by the desire of the parties to circumvent or avoid the banking restrictions under which the taxpayer in its loans on collateral to any person or firm was limited to 10% of its capital and surplus.

11. The Board erred in failing to find that at all times R. H. Moulton & Company treated the securities in question as its own.

12. The Board erred in failing to find that very frequently the taxpayer furnished the money to R. H. Moulton & Company to make the original purchase of the tax-exempt securities.

13. The Board erred in failing to find that in many instances R. H. Moulton & Company sold to its customers some of the securities held by the taxpayer and would exercise the repurchase agreement to the extent of obtaining securities necessary for delivery to the customer.

14. The Board erred in holding and deciding that there are no deficiencies in tax for the years 1928 and 1929. [40]

15. The Board erred in not holding and deciding that there are deficiencies in tax for the years

1928 and 1929 in the respective amounts of $2,439.76 and $1,620.52.

WHEREFORE, the Commissioner petitions that said report and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the laws and with the rules of said Court and be transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN
Assistant Attorney General.
(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Of Counsel:
HAROLD D. THOMAS,
Special Attorney,
Bureau of Internal Revenue. [41]

United States of America,
District of Columbia.—ss.

HAROLD D. THOMAS, being duly sworn, says that he is the Special Attorney, Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge

except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

HAROLD D. THOMAS

Sworn and subscribed to before me this 3rd day of October, 1934.

(Sgd) GEORGE W. KREIS,
Notary Public

My commission expires Nov. 16, 1937.

[Endorsed]: Filed Oct. 9, 1934. [42]

[Title of Court and Cause.]

To: V. K. Butler, Jr., Esq.,
Standard Oil Building,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 9th day of October, 1934.

(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 17 day of October, 1934.

(Sgd) V. K. BUTLER, JR.,
Attorney for Respondent on Review.

[Endorsed]: Filed Oct. 25, 1934. [43]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: The Bank of California, National Association,
400 California Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 9th day of October, 1934.

(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 17 day of October, 1934.

(Sgd) J. J. DANTES
Cashier,
The Bank of Califorinia, San Francisco,
Respondent on Review.

[Endorsed]: Filed Oct. 25, 1934. [44]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Ernest H. Van Fossan, Member of the United States Board of Tax Appeals on September 19, 1933. V. K. Butler, Jr., Esq., appeared for the taxpayer and E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, appeared for the Commissioner.

Prior to the taking of testimony, upon motion made by taxpayer's counsel, the cases were ordered consolidated for hearing.

JAMES JOSEPH HUNTER

was called as a witness by and on behalf of the taxpayer, and having been first duly sworn, testified as follows:

Direct Examination.

I am Vice President of the Bank of California, the petitioner. As to my duties—I have charge of

(Testimony of James Joseph Hunter.)

the loans, or at least a considerable oversight of the loans and the branch credits, the foreign departments, somewhat supervisory in the latter, but that is the main activity. That includes my familiarity with the investment policies of the bank, as well as loan practices of the bank. During the course of the years 1928 and 1929 which are involved in this proceeding, it was the practice of the bank from time to time to purchase bonds subject to repurchase agreements. The practise and procedure in that regard was this. From time to time the bank would have money that they felt justified in putting out in various types of short term loans, as well as long term loans, and under the short term investments, which would be buying commercial paper, treasury notes, or these repurchase agreements, which we were in a position—we had the stipulation that if these people such as Moulton would take them up within the specified time, they were the equivalent of any other short term investment. If not, we felt we were in a position to sell it and accomplish the same purpose. As to how the price was paid in our negotiations for the purchase of these bonds subject to repurchase agreements, the price was fixed —well in connection with the subject that is under discussion here, dealing with tax exempts, because we bought other securities that were not tax exempt; on the repurchase agreement the price was fixed on the yield base and the yield, the tax exempt phase of it was allowed in the yield, because we

(Testimony of James Joseph Hunter.)

didn't expect to take any benefits from the tax exemption. We did not make any arrangement for interest with the persons from which we purchased securities, other than the stipulation that the interest accrued on the bonds while owned by us should be our property. They were our securities; we treated them as such all the way through our records.

Whereupon counsel for the respective parties stipulated that the net amounts of income derived by the bank from the bonds held by it under repurchase agreements were $20,331.40 and $14,731.98 respectively for the years 1928 and 1929 and that the amount for each year was made up as follows: The sum of three factors, first, coupons actually cashed by the bank during the year from securities held by it under the transactions under review, plus accrued interest actually received by the bank on resale of these securities to the investment dealer, [45] plus interest accrued at the end of the year on bonds held by the bank under these transactions, a resale not yet having been made, and deducting from such sum the accrued interest paid by the bank to the investment dealer selling the securities to it on the purchase in the first instance.

The witness then identified the credit book of the Bank of California and testified:

This is the record of credits that come into the departments that handle these transactions; that was the note department in the first instance. This is the book of original entry.

(Testimony of James Joseph Hunter.)

The witness was then shown a document, purporting to be an original repurchase agreement entered into by the bank with R. H. Moulton & Company relating to $7,000 face value City of Hanford municipal improvement bonds, and, attached thereto, another document purporting to be a bill of sale of the same date from R. H. Moulton & Company to the Bank of California recording sale of the bonds to the bank at 95 and accrued interest, or a total of $6,805.56; and testified:

Those are the original documents taken from the files of the bank and they evidence the transaction which they purport to represent with R. H. Moulton.

Said documents were offered and received in evidence as

(Testimony of James Joseph Hunter.)

PETITIONER'S EXHIBIT NO. 1,
with right to substitute a photostatic copy thereof.

[Endorsed]: Petitioner's Exhibit 1. Admitted in evidence Sep. 19, 1933.

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco
405 Montgomery Street

New York Los Angeles
San Francisco, California.

Sold to—Bank of California, N. A.

San Francisco, July 11, 1929

$7,000 City of Hanford Municipal Improvement 5% Bonds			
@ 95		$6,650.00	
2,000	Aug. 1, 1958		
4,000	" 1961		
1,000	" 1963		
Int: 5 months 10 days		155.56	$6,805.56

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 173/74-186/89-199
$5,000— 8/3/29
1,000—10/14/29
1,000—11/2/29 [71]

(Testimony of James Joseph Hunter.)

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller," agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer," agrees to buy the following bonds, namely:

$7,000 CITY OF HANFORD MUNICIPAL IMPROVEMENT 5% BONDS

Numbers and denominations as follows:

$2,000	Aug. 1,	1958	Nos.	173/74
4,000	"	1961	"	186/89
1,000	"	1963	"	199 [72]

The purchase price of each bond is as follows: (Plus accrued interest)

August	1, 1958	maturity	@ 95
"	1961	"	@ 95
"	1963	"	@ 95

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

(Testimony of James Joseph Hunter.)

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 11th day of July 1929.

THE BANK OF CALIFORNIA, N. A.
STUART F. SMITH
Vice-President
R. H. MOULTON & COMPANY
By ELMER BOOTH.

The witness then testified:

This precise printed form of repurchase agreement was uniformly used in all of our transactions for the purchase of bonds subject to repurchase agreement. The same form would cover every transaction by the bank in the purchase of bonds, subject to repurchase agreement, during the two years 1928 and 1929, here involved. At the time of the purchase it was the uniform practise to receive a [46] bill of sale from the dealer making the sale to us, in the form of the bill of sale attached to this bond.

(Testimony of James Joseph Hunter.)

The entry of this transaction of July 11th was made in the credit book right here,—"R. H. Moulton & Company". It is entered as a credit to R. H. Moulton & Company, $7,000. Hanford Municipal Improvement 5s at 95 and interest, $6,805.56. This is a handwritten record in a bound volume. It is the original entry. This book of records shows the treatment given the coupons on these bonds due August 1st, 1929; it is on page 107 here in this same credit book—we have interest on investments, proceeds, Aug. 1st coupons, $7,000, City of Hanford $175, under "coupon interest on investments" which is written or impressed in rubber stamp opposite this precise entry; "interest on investments" is the rubber stamp; they used that for that, but the balance of it is continued in handwriting, and the same thing applying here. (indicating) I refer now to the first entry to which I previously referred, $6,805.56. This went to the credit of Moulton when we bought it of them.

As to the next step in the accounting system of the bank with reference to the crediting of the $175. in the general ledger, there is an interest tag made out, called "Interest on Investments" which would go through the routine of the bank and land up in the general ledger department to go to the credit of interest on investments. The interest from the permanent investments of the bank that were held in what we call the Coupon Department were also credited to the general account,

(Testimony of James Joseph Hunter.)

"Interest on Investments". The Coupon Department is a different department that handled that, because they were only referred to at stated times. Our treatment of interest on what I have described as these short term investments [47] under repurchase agreement was precisely the same as our treatment as to interest derived by the bank from investments of the long term portfolio.

As to the resale to R. H. Moulton & Company on August 3rd of $5,000 par value of these same Hanford bonds, this volume indicates or records that transaction; on August 3rd bond account number two was credited with $4,750, representing $5,000. City of Hanford Municipal Improvements at 5. The entry with reference to accrued interest at date of resale was interest on investments, two days interest on that, making $1.39. That entry was treated in exactly the same way as coupon interest to which I have just testified, and it was entered in the general ledger with the general interest on investments held by the bank. As to the bill of sale indicating that on October 14th an additional bond was resold, on October 14th bond account number two is credited with $1,000 City of Hanford Municipal Improvement, 5, 95, $950 with two months, 13 days interest, $10.14. That represents the accrued interest since August 1st; and that entry was treated in precisely the same manner as the other two items about which I have testified. As to the bill of sale indicating the last bond sold November 2nd, the entry is on November 2nd bond account No. 2

(Testimony of James Joseph Hunter.)

credited, $1,000 City of Hanford Municipal, 95 $950, with 3 months and one day interest to the interest on investments, treated exactly the same way, $12.64.

This transaction which I have followed from its inception to its conclusion was absolutely typical of every transaction involving the purchase of bonds subject to repurchase agreement had during the two years under review; and all interest received was treated in precisely the same way.

Upon examination by the presiding member the witness testified:

Typical in that the procedure was the same but different transactions varied—different securities, and the record of them would vary in the number [48] of transactions involved in the handling of those securities; the repurchase might be handled in one transaction, or half a dozen. The repurchase agreement provides for partial purchases. As to whether we ever had instances in which the same bonds would be the subject of subsequent transactions, that would be rather difficult, because it might be—I couldn't say demanded—the demand but considered—it would be a separate transaction, each transaction, as we have in the handling of grain sometimes we see the same warehouse receipt in several different accounts, and back into the same account originally.

Whereupon the witness on direct examination by Mr. Butler identified three purchase slips of R. H. Moulton & Company taken from the records of

(Testimony of James Joseph Hunter.)

the bank, one dated August 3, 1929 reading "R. H. Moulton and Company, San Francisco" and thereunder "Bought of Bank of California, N. A." itemizing the $5,000. Hanford bonds, and two other similar ones dated October 14, 1929 and November 2, 1929. Said three slips were offered and received in evidence as

PETITIONER'S EXHIBIT NO. 2,

with right to substitute photostatic copies thereof.

[Endorsed]: Petitioner's Exhibit 2. Admitted in evidence Sep. 19, 1933.

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco

405 Montgomery Street

New York Los Angeles

San Francisco, Aug. 3, 1929.

Bought of—Bank of California, N. A.,
San Francisco, California.

$5,000 City of Hanford Municipal Improvement 5% Bonds		
@95	$4,750.00	
4,000 Aug. 1, 1961		
1,000 " 1963		
Interest 2 days	1.39	$4,751.39

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 186/9-199 [73]

(Testimony of James Joseph Hunter.)

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco

405 Montgomery Street

New York Los Angeles

San Francisco, Oct. 14, 1929.

Bought of—Bank of California, N. A.,
San Francisco, California.

$1,000 City of Hanford Municipal Improvement 5% Bond Aug. 1, 1958 @95	$ 950.00	
Int: 2 months 13 days	10.14	$ 960.14

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 173. [74]

(Testimony of James Joseph Hunter.)

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco

405 Montgomery Street

New York Los Angeles

San Francisco, Nov. 2, 1929.

Bought of—Bank of California, N. A.,
San Francisco, California.

$1,000 City of Hanford Municipal Improvement 5% Bonds		
Aug. 1, 1958 @95	$ 950.00	
Int: 3 months 1 day	12.64	$ 962.64

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 174 [75]

The witness on direct examination then testified:

These three purchase slips are the form used and are typical of all our transactions in which sales were made by us of bonds held under repurchase agreement, subject only to the distinction which your Honor has pointed out, that there were different amounts, different securities, and at times different dealers involved.

When the Comptroller of Currency periodically issued his call, the bonds returned by us in our statement, which were subject to repurchase agree-

(Testimony of James Joseph Hunter.)

ments were handled as property of the bank, in the same way that our own—the two accounts were combined for the government comptroller reports. In the statement we would [49] have one item, let us say loans and discounts, and in that we listed all notes, bills receivable, bank acceptances, and things of that kind. In another item we would have bonds, and under bonds we would include all our government—long term, short term government or municipal, industrial. In our statement we listed bonds held subject to repurchase agreement in the same manner as we returned all other bonds owned by the bank.

Upon examination by the presiding member the witness testified:

Referring to the combining of the two accounts in making up the statement I meant the two bond accounts. For convenience, we kept those under which there was a repurchase agreement in a separate account, which we called bond account No. 2; because they were frequently—somebody wanting to buy them back, we kept them in a different place, where they were more convenient to the public, at least to our customers that were handling them in that way. It was just a matter of convenience.

The book which was identified and to which I referred was a book from the note department. All the transactions that are handled in that particular department are recorded in that book—loan discounts, repurchase agreements of all classes. You

(Testimony of James Joseph Hunter.)

see the officers on the note desk are more familiar with handling securities, they are senior men and are handling them frequently in connection with securities, and we felt that they were better equipped to give good service to our clients than if we put it back in the coupon department, where it is not as accessible to the public, and they are not as familiar with handling them. That is merely a matter of convenience, not of the principle involved.

The witness on direct examination by Mr. Butler then testified:

I have referred to these two bonds accounts; bond account No. 1 was the long term investment account—bond account No. 2 evidenced or covered bonds held by us under repurchase agreements. But it is true that the interest accrued to or derived from bond account No. 1 and bond account No. 2 was treated in precisely the same way and entered in the general bank account of interest on investments. In the call statement and in the published statement put out by the bank, the bonds held in bond account number one and bond account number two were returned as one single aggregate sum representing bonds owned by the bank. We so considered them. This practise of the bank was not challenged by the Federal examining authorities when we made our returns.

The witness then identified a sheet headed "Bond account number two, R. H. Moulton & Co." relating to the transaction regarding the City of Hanford $7,000 face value accruing in 1929, and testified:

(Testimony of James Joseph Hunter.)

This is the ledger record of the City of Hanford Municipal Improvement bonds we purchased from them. This is our permanent ledger record evidencing the detail and posting of the various transactions which I have assembled and described in my earlier testimony. [51]

Whereupon said sheet was offered and received in evidence as

PETITIONER'S EXHIBIT NO. 3

with right to substitute a photostatic copy thereof.

(Testimony of James Joseph Hunter.)

[Endorsed]: Petitioner's Exhibit 3. Admitted in evidence Sep. 19, 1933.

R. H. MOULTON

Bond Account No. 2 City of Hanford Municipal Improvement

(Title of Bond)

Dated Aug. 1, 1923 Maturity Serial 1933/42 Interest @ 5% Payable Feb. 1 & Aug. 1 1907

	Date 1929		PARTICULARS		DEBIT Par	DEBIT Cost	Rate	CREDIT Par	CREDIT Sale	INTEREST Debit	INTEREST Credit
91	July 11	7/1000	173/4-186/9-199	Various	7000	6650	95			155.56	
107	Aug 2	Proceeds Aug 1st cpns. credited to int. acct.									175.00
108	3	5/1000	186/9-199	Various			95	5000	4750		1.39
155	Oct. 14	1/1000	173	"			95	1000	950		10.14
169	Nov. 2	1/1000	174	1958			95	1000	950		12.64
	June 1 5,1932	5/1000	121/4-129	Various	5000	4600	92			93.06	93.06
	July 1	5/1000	121/41-129	"			92	5000	4600		11.11
	11	15/500	52/6-58/65-67-70	"	7500	6825	91			166.67	
											55.55
	14	5/500	63/5-67-70	"			91	2500	2275		1.05
											88.88
	16	8/500	53/56-59/62				91	4000	3640		2.79
									5915		22.24
	28	2/500	52 & 58	1933-36			91	1000	910		2.34

[76]

(Testimony of James Joseph Hunter.)

The witness further testified:

If we purchased bankers acceptances and discount commercial paper for the account of the bank those investments would be carried at the note desk. That is for the same element of convenience that I have testified with reference to the bonds. That was done because of the frequency of the turnover, due to the short term character of the transaction. Formerly, before the recent bank act, the banks were permitted to lend money on securities for other banks, and we held those in that department. They weren't our own department but they were held at the note desk. But with reference to bankers acceptances and short term commercial paper, that was our practice.

Upon examination by the presiding Member of the Board, the witness testified:

As to when we first adopted this method of dealing with tax exempt securities, we first adopted the method of dealing on repurchase agreements in, I think, about 1923, 1924 or 1925. I am not very clear as when it was. As to the advantages of dealing with the securities in this manner, it was an opportunity to put our money on a short term basis, and it also gave us the opportunity in case of need, advancing more money than—or at least putting our clients into possession of more money than we could lend them if the lending process were used. It differs from a loan in that we actually agree—we buy them actually, and we give them the right to repurchase them within a stipulated time. We

(Testimony of James Joseph Hunter.)

feel that we have the complete ownership of those, subject to that, and as soon as that time is up, they are our securities. As to how it differs from a loan on collateral from the standpoint of or advantage to the bank, it is rather a diffi- [52] cult line to draw; that is the reason I suppose we are here today. We have the money—the outlet for the money. It suited our purpose to have short term things like that, and as a matter of fact, that would apply to loans. We could call a loan if we had a call loan out. Of course, we haven't such a thing as call loans in San Francisco. There is no real market, active market. The market is very thin, so we haven't such a thing as call loans. For that reason—at least that is among the factors.

As to whether the bank bought any short term municipal paper or securities without repurchase agreements, we bought lots of governments, short term U. S. Governments. Regarding the factor, determining the procedure from the standpoint of the bank, as to whether we bought outright without repurchase agreements or whether we had a repurchase agreement, there wasn't any really important factor that decided it. If one of our clients—if it suited us to make a short term purchase, these securities that we bought on the short term basis on this repurchase agreement, they were usually a long term item. We couldn't—there would be very few 90 days—securities maturing in 90 days. They were long term bonds but short term purchase agreements.

(Testimony of James Joseph Hunter.)

As to whether we bought outright without repurchase agreements other bonds of a similar kind, there were very few of that type offered, or at least those short terms that were offered on the market. We would buy them when we could get them and put them away for short term investments.

Whereupon the questions of the presiding Member of the Board and the answers of the witness were as follows:

Q. Now, you spoke of the opportunity to lend more money to the customer, or advance more money, was your term.

A. Place the funds with them.

Q. To advance more money to the customer in this manner than you could on [53] a loan. I don't quite understand that.

A. Well, banks have a limit to which they could lend to any customer, their capital and surplus, ten per cent of their capital and surplus.

Q. That is by state law?

A. No, by national.

Q. By national?

A. Yes, and by state, too, as a matter of fact. It is a fairly uniform practice.

Q. And you could avoid that restriction by employing this means?

A. Well, it wasn't exactly a question——

Q. I impute nothing by the term "avoid".

A. Yes, we could buy from these people a couple of million dollars worth of good securities, while we could only lend a million and a half for our bank.

(Testimony of James Joseph Hunter.)

Q. Well, from the standpoint of the customer, how does the net result of this transaction differ from that for a loan on collateral?

A. Well, the customer got a better rate than we would make a note desk loan for.

Upon further examination by the presiding Member the witness testified:

The price at which we agreed to resell bore a substantial relation to the market price, but it was fixed at the time we originally purchased; as to whether it took into account fluctuation that might occur subsequently, it wasn't an exact thing. There would be, I think, in most cases probably it was a little under the market. The price at which we sold back to the customer was always the same price at which we purchased; always the same price, with the accrued interest of course. The client got the benefit of any advantage in rates that accrued between a tax, for instance, and a non-tax. The bank got no [55] benefits from any of the tax exemption phase of it. The client of the bank got the benefit of any advantage that there was in the price as a result of the tax exemption, but the bank got no benefit of the tax exemption.

On further direct examination by Mr. Butler the witness testified:

I mean—in the rate that was fixed, or the yield that was fixed through the price agreed upon it reflected the tax exemption. And that benefit inured to the investment dealer selling to us, by reason of the lower yield to the bank. But I did not mean

(Testimony of James Joseph Hunter.)

to admit that the bank waived any right to tax exemption from the interest and the coupon received, while in its possession.

Cross Examination.

On cross examination the witness testified, as follows:

With respect to these purchases and repurchases we have been talking about, repurchase was always made; sometimes they were made by repurchasing the total amount covered by one purchase agreement and sometimes by taking back at repurchase a portion at a time. Quite frequently these transactions would probably be entered into upon the suggestion or solicitation of the bank. When we get long in funds, for instance, overnight funds, we are sometimes very long in cash money overnight, and we will call up different people to see if they can use money overnight, and we buy a great many bankers acceptances on that basis, on the repurchase agreement basis. The bank sometimes has idle funds which they are glad to invest or glad to get some return of interest on, rather than have them remain idle.

The yield that we figure out depends upon the price of purchase. The bank gets the coupon rate, and the yield is necessarily related to the purchase price. If the purchase price is under market the yield is greater than the face of the bond; if the price is higher, it is lower than that. [55]

(Testimony of James Joseph Hunter.)

All investments purchased by the bank are not handled by the note department. All of our investments are by no means covered by purchase and repurchase agreements. All the bonds held by the bank were not in bond account No. 2; just those under the repurchase agreements were included in account No. 2. In our report to the Comptroller, grouping these bonds in controversy with all other bonds, there was no other item that affects these particular bonds; we don't set up a contingent liability for the repurchase agreements. Contingent liabilities are not a practise in banking. It is not a practise to set those up.

Until quite recently we discourged demand loans. As a matter of fact we had some notes which were demand, but we didn't consider them demand, notes payable on demand. We would take them payable on demand for a specific purpose, that if certain things happened we wanted to put ourselves in the position of making demand, but we didn't take demand notes in the ordinary course of banking. They were demand loans in the event we had to demand the money but as a matter of practise I cannot recall a case where we did demand. There is a limit on the amount of money we may loan to one particular person. During the years 1928 and 1929 we often made loans to people on collateral and the collateral received was often in tax-exempt securities of the kind in question.

Under the arrangements with R. H. Moulton & Company, when we purchased such bonds we would

(Testimony of James Joseph Hunter.)

pay them the interest that was accrued at the face value of the bonds. When we sold them back to R. H. Moulton & Company we would receive accrued interest on the same basis; the coupon rate would be accrued in both the sale and purchase by us. The amount of accrued interest on purchase and on sale would depend entirely upon the particular date of purchase and sale. As to whether sometimes the interest accrued on the sale was greater than the amount we paid on the purchase of the same security and other times, vice versa,—it depended on the coupon rate. It is entirely a coupon rate transaction, the [56] interest phase; we might buy it a few days after a coupon date, in which case we would pay probably a few dollars accrued interest, and they mightn't be taken up until after the next coupon date, and it might actually be less than that. If we purchased a few days before a coupon date, we would pay them a considerable amount of interest and collect the coupon—and when they repurchased them, there would be just a small amount of interest—but you would have to add the coupon interest, the amount of the coupon to the accrual subsequent to the coupon, to know the total amount the bank received, and then deduct the amount that we paid. It is all based on the coupon date. As to whether in some cases the interest accrued on sale was more than the interest accrued on purchase and in other cases the reverse —you must combine the two of them to get the

(Testimony of James Joseph Hunter.)

picture, because always the interest that we would receive would be more than the interest we paid, because that is our investment in the meantime. Leaving out any interest that we would collect by reason of the coupon clipped, we might pay them more interest than we collected from them, but that would be just a pure matter of mechanics. As to whether there was any particular date during these years that was fixed so as to make our date of purchase either shortly before or shortly after the due date of interest on the bonds—that was all a matter of incident, not principle. I testified that the price at which these bonds were fixed in the purchase and in repurchase was usually under the market price.

Redirect Examination

Upon redirect examination the witness testified:

When I testified that generally the price agreed upon was less than the market price, I gave it as my recollection that it was slightly under it. [57]

Recross Examination

Upon recross examination the witness testified:

By slightly under I mean probably one to five per cent. It might be as much as five per cent under the market.

Redirect Examination

Upon further redirect examination the witness testified:

It is a pretty fair statement to say that with respect to a number of the types of securities held

(Testimony of James Joseph Hunter.)

under these repurchase agreements, it was frequently the fact that the bonds in substantial quantities did not have a ready market in case the bank wished to sell the block. That is a factor which should have entered into our determination in fixing market price.

L. A. WILTON

was called as a witness by and on behalf of the taxpayer and having been first duly sworn, testified as follows:

Direct Examination

I am Auditor of the Bank of California. Some of the books of the bank are kept on the accrual basis and some are not. For income tax purposes the bank is on the accrual basis.

Here the taxpayer rested.

V. E. BREEDEN,

was called as a witness by and on behalf of the Commissioner and having been first duly sworn, testified as follows:

Direct Examination

I am vice-president of R. H. Moulton & Company in charge of the San Francisco office, connected with the firm since 914. In 1928 and 1929 I was vice-president of the company and manager

(Testimony of V. E. Breeden.)

of their San Francisco office. R. H. Moulton & Company are investment bankers, specializing in municipal bonds. As to whether we were dealers exclusively in municipal, county, or state bonds ordinarily [58] known as tax exempts, I should say not exclusively—possibly one-half of one per cent of our business might be brokerage transactions, corporation bonds or Canadian municipals that might go through. Ot least 99 per cent of our business was dealing in bonds ordinarily known as tax exempts. As to whether it was necessary to borrow substantial sums of money in order to carry these bonds or securities—it was necessary to finance the business either through borrowings, or through the sale of the bonds, the temporary sale and repurchase of the bonds. As to whether there was a large amount of borrowed capital at all times including the years 1928 and 1929—I would't say borrowed capital; we have our own capital. During that period of time we had contingent liability on repurchase agreements to purchase bonds back we had sold. We did practically all the business on the sale of securities under repurchase agreements; the actual borrowed money we used during that period was very small, occasional transactions.

I should say 99 per cent of our business was done through purchase and repurchase agreements. All of our business was not done with the Bank of California. We did business with many banks here in San Francisco, particularly with the Wells Fargo

(Testimony of V. E. Breeden.)

Bank; in Los Angeles with the Security National Bank, Citizens National Bank; and in New York with various New York banks. We always had on hand an inventory of securities much larger than our own capital. I am familiar in a general way with these alleged purchase and repurchase agreements that we have been talking about, and I was present to hear the other testimony. Very frequently these so-called sales to the bank and repurchase agreements were entered into contemporaneously with the purchase of bonds by R. H. Moulton & Company, but very frequently it might not happen on the same day. There might be no understanding at all. My position was predicated by the [59] knowledge that I knew that various banks in this community and other communities were interested in buying bonds upon repurchase, and I was in a position to make a commitment on bonds, and then frequently made my arrangement after the commitment was made. In other words, there is more or less of a constant market for this type of repurchase, of sale and repurchase.

If we wanted to purchase some of these bonds and didn't have the necessary capital we sometimes made arrangements with the bank whereby these bonds we were purchasing could be sold to the bank under an agreement by which we could repurchase them. We have always carried out these repurchase agreements. The bank has never refused to carry them out. Frequently we took back only a part of

(Testimony of V. E. Breeden.)

the bonds covered by a particular agreement, depending on the size of the repurchase agreement; we might have one covering $500,000 County and City of San Francisco bonds, and I might have occasion to exercise that repurchase is part. I might not buy the entire $500,000 worth of bonds back at one time. The agreement itself calls for the resale of all or any part at a stipulated price.

As to whether these bonds were turned over to the bank, the bank bought the bonds from us and signed an agreement to resell them to us. The agreement covered the sale to the bank and a reciprocal agreement to resell and repurchase back over a period that might run ten days, might run sixty days, might run ninety days, depending on the negotiations that we made with our banker. It was in the agreement that any time we wanted to get any of those bonds back before the expiration of the agreed time, we could get them back at the agreed price, and as a matter of fact that was frequently done.

If we had a sale to a customer and sold to a customer some of the bonds which had been sold to the bank under this arrangement, we would then go to the bank and repurchase those bonds for delivery to the customer. That transaction [60] would take place in many instances and did take place.

Upon examination by the presiding Member of the Board the witness testified:

The advantage to R. H. Moulton & Company of this type of transaction was this—We were able to

(Testimony of V. E. Breeden.)

sell securities to our bankers under an agreement to repurchase them at any time, and it enabled us to conduct our business in such a way that when we distributed these bonds in smaller blocks, because we bought wholesale largely, we could go to the bank and demand repurchase according to the agreement. Furthermore, the transaction—there was no limitation on the amount of bonds that the banks could buy. In other words, the banks could buy as many bonds as they wished, and if our bankers or any bank was willing to buy two million dollars worth of bonds from us on repurchase agreement on a mutually satisfactory price, it was a desirable transaction from our viewpoint. If we were handling our business otherwise, why we might be restricted in our financing. The bank was really carrying our inventory for us. That is what it really amounted to. The banks had certain surplus funds, and it was a very desirable form of investment for the bank, the purchase of these bonds with the agreement of resale back to us and our agreement to repurchase. They had short term funds that were looking for investment, and the prices on these repurchase agreements were settled through negotiations between the bankers and ourselves at what they felt was the current rate, or the rate in which they might be interested in making the purchase.

As to the advantage of this plan over a sale or a loan with collateral, the mechanics of it were sim-

(Testimony of V. E. Breeden.)

pler, and if—due to the large amount of money we use in our business, we have a large volume of transactions, and we would have to be doing business with a great many different banks in order to get or [61] obtain sufficient funds, so it is much simpler to make use of this instrument under repurchase agreements. The bank is limited in its loan under collateral to ten per cent of the capital and surplus to one firm.

These repurchase agreements were a definite commitment to repurchase at or before the expiration of a certain number of days. None of them were ever allowed to expire without completing the repurchase. That would be a violation of our contract. Some of them were allowed to go to the expiration day, and then prior to the expiration day they would be extended. As to whether we would in effect enter into another agreement, it would be an absolutely new deal, new price, and new terms, and would have to be satisfactory to the bank. If I had a repurchase agreement maturing on the 1st of June and I wished to extend the repurchase agreement, if it was agreeable to the bank, I would call up one of the bank officers and call his attention to the fact that this repurchase agreement was going to expire on the 1st of June, and I would ask him if it would be agreeable to him to make another repurchase agreement running a stated length of time at a stated price, and he would say either he would or would not. If he wouldn't, then I would have to arrange to make—

(Testimony of V. E. Breeden.)

either make a loan, or else I would have to go and find some other investor interested in carrying it.

We never had a case where they refused to extend. They never refused to extend or enter into a new purchase agreement. Allow me to correct a statement there. We have had times when our bank, one of our banks might say to us they would prefer to terminate the transaction on or before the repurchase date, and in that case, we might make a repurchase agreement with some other bank that were in funds. In other words, the bank might want to use the funds in different channels, might have a more attractive arrangement to make for the [62] investment of their funds, and in many cases our repurchase agreements were terminated on that basis, the bank saying, "We would prefer not to use as much money as you are using. We have not as much money for investment in this type of securities."

The mechanics of consummating an extension or new purchase and repurchase would be this. I would call my banker on the telephone, or call on him personally, and I would say, "I have a repurchase agreement here covering $100,000 State of California 4 per cent bonds, due 1940, upon which the agreement is effective at 98 and accrued interest, and we would like to effect a new agreement, new repurchase agreement at 98 and accrued interest," and the banker might say, "Well, I believe the money market has changed and I would like to make this at 95," or we might say, "We believe conditions

(Testimony of V. E. Breeden.)

have changed in the last 60 days and you should make this agreement at 101," and the banker might say, "Well, due to our cash position, in view of the demands from other sources, we would prefer not to make another repurchase agreement." In that case, I would have to go to another bank and arrange a transaction.

On such an occasion checks would change hands. We would exercise the original repurchase, and hand the check to the bank and cancel that agreement, and then we would make another sale to the bank of the securities, at whatever the stipulated price was, on a new repurchase agreement. In that particular case one transaction would be against the other, except that the check goes through the bank's books. Many times we would pay one bank with a check on another bank. As to whether we ever paid one bank with the check of another bank where we were extending a repurchase agreement, my cashier would have to answer that question; I am not familiar with that detail; that is handled in the cashier's department and I couldn't answer that question. I don't know. I [63] supervise the transaction and know the general routine of them, but I don't follow the details of each transaction from its inception to its conclusion. As to how many times a repurchase agreement in regard to the same bonds was extended,—under conditions such as we had in the early part of this year, where we had a bank moratorium and complete stagna-

(Testimony of V. E. Breeden.)

tion in the bond market, there was a period when repurchase agreements were carried over several times. There would be several instances where on a given day we sold and also repurchased the same day, and then subsequent to that there would be other transactions of the same kind. There is no reason why those transactions might not continue for an indefinite period as long as the bank was willing to make the purchase and we were willing to make the sale.

Cross Examination.

On cross examination the witness testified:

Concerning the example cited of a second repurchase agreement at the expiration of the period of the first, and the exchange of checks, it is my understanding that in the first instance the check would clear and the two transactions were independent of one another. If a different price were arranged, the check evidencing the repurchase and the check evidencing the subsequent sale must necessarily be for different amounts. Our business depends on our credit, our standing, and we are not going to violate any repurchase agreement.

Had we conducted the major part of our business through collateral loans under the rules, national and state, governing banking practise, we would have been required to supply a margin for our collateral loan. Had we been borrowing on collateral we would have been subject to the limitations placed by the National Bank Act, or the National Act on

(Testimony of V. E. Breeden.)

State banks, that only ten per cent [64] of the capital and surplus of the bank would be advanced to any particular individual. In my opinion, by following the repurchase plan, we were able to obtain our accommodations on a better basis than by paying the current rate of interest on collateral loans.

Redirect Examination.

On redirect examination the witness testified:

These transactions covered by purchase and repurchase agreements were very frequently entered into at the instance of R. H. Moulton & Company; when we needed the money to carry our inventory we would go to the bank and enter into one of these transactions. And sometimes the bank came to us; they did that because they had—I assume it was in view of their very easy money position, and they were looking for an opportunity to invest their surplus funds. Take under present conditions, when you have a plethora of surplus funds, there is not a banker who wouldn't be delighted to have half a million in repurchase agreements, because they are an attractive form of banking investment. We have been solicited out of other money markets very frequently; banks in New York have even requested that they would be glad to have us submit repurchase agreements on securities. In other words, this method of handling securities is very universal, and it is an active market for that kind of accommodation.

(Testimony of V. E. Breeden.)

I cannot be certain whether we had any offers from New York firms for transactions of this kind during 1928 and 1929, but, if my memory has not failed me, we had some requests for repurchase from the East River National Bank about that time. We had chances or offers to enter into these agreements, particularly in 1928, not so much in 1929, because the money market in 1929, the stock market was taking most of the demand for funds.

[65]

J. V. JACOBI

was called as a witness by and on behalf of the Commissioner and, having been first duly sworn, testified as follows:

Direct Examination.

I am cashier of R. H. Moulton & Company and that was my position with them in 1928 and 1929. During those years I had supervision of the keeping of the books of R. H. Moulton & Company. I am familiar in a general way with the arrangements made between R. H. Moulton & Company and the Bank of California in 1928 and 1929 regarding the purchase by the bank of certain bonds and the repurchase of the same by R. H. Moulton & Company. Those transactions are recorded in the books of R. H. Moulton & Company. They are recorded in the general ledger. As an instance of the purchase of bonds by R. H. Moulton & Company and the entry

(Testimony of J. V. Jacobi.)

recording same there is an entry on January 10, 1928, the purchase of $10,000 State of California State Building 4 per cent bonds from R. H. Moulton & Company, New York. Our company purchased them of R. H. Moulton & Company, New York, just the same as any other client or bond house so far as our books are concerned. Bonds due July 2, 1965, purchased at 103, and accrued interest. Bonds were sold to the Bank of California on January 13, 1928, on repurchase, at 95 and accrued interest. At the time they were sold to the Bank of California a repurchase agreement was entered into contemporaneously with their sale. The entry for that sale to the bank was made in the journal. I can find that entry. I have the ledger account right here—a sale to the Bank of California on January 13, 1928 of $10,000 State of California State Building 4 per cent bonds at 95 and accrued interest. The entry was made in the journal and credited to the general ledger. The bond sales to our regular customers are in the bond ledger, a different ledger.

Referring to the same transaction, the other entries of which I have just [66] testified to, our books reflect the entries in connection with the repurchase agreement. On February 1st we repurchased $10,000 State of California State Building 4 per cent bonds from the Bank of California at 95 and accrued interest. This is the repurchase account in the general ledger. Tracing this account

(Testimony of J. V. Jacobi.)

through, showing the amounts of accrued interest—on January 13, 1928 when the bonds were sold to the Bank of California, they were sold for $9,600 plus accrued interest for 11 days, amounting to $12.22. On February 1st, 1928, they were repurchased at the same price plus accrued interest for 29 days, amounting to $32.22. The books reflect the sale of those same bonds to a customer; the bonds were sold on February 1, 1928, to Farmers & Mechanics Bank of Sacramento, at $103.476 per bond. These particular bonds, which I have just testified to, were purchased at approximately 103, sold to the bank at 95 and accrued interest, purchased back from the bank at 95 and accrued interest, and sold to the customer at approximately 103. In connection with the original purchase, that means 103 plus accrued interest and the sale to the customer means at approximately 103 plus accrued interest.

The transactions under these purchase and repurchase agreements with the Bank of California were entered into a separate ledger than the regular transactions of bonds with customers, and entered into a separate ledger from the regular purchase of bonds by R. H. Moulton & Company. As to the position of R. H. Moulton & Company with respect to these bonds at the end of any particular accounting period, the bonds were carried as our assets. These particular bonds which the bank held under repurchase agreement were carried as part of the assets of R. H. Moulton & Company.

(Testimony of J. V. Jacobi.)

Whereupon the following colloquy took place:

Mr. BUTLER: If your Honor please, may I interject at this moment? [67]

I have no disposition to do anything which will prevent throwing all the light possible on this case, and supplying all the facts that may be deemed relevant; but I think it would be well to state that in this case is involved the tax liability of the Bank of California. It was the owner of the bonds, to show how it treated those bonds on its books.

I have purposely avoided objecting to this line of testimony previously, but I will suggest at this time the question is not the treatment of the matter on the books of R. H. Moulton & Company, or any other investment dealer, but the taxpayer itself.

Mr. THOMAS: I think, your Honor, that way it was carried on the books of R. H. Moulton & Company is certainly relevant and competent testimony.

Mr. BUTLER: Moulton might have treated it any way he desired, and it would not be in any way binding upon the taxpayer.

The MEMBER: You may proceed with the evidence.

The witness on direct examination further testified:

These bonds were carried as the assets of R. H. Moulton and Company and the liability, or contingent liability if you want to call it that, for the repurchase of these bonds, was carried on the books as a liability.

(Testimony of J. V. Jacobi.)

Cross Examination

On cross examination the witness testified:

Referring to the eight point spread in the specific instance selected, the differential has been very much less in many cases. There have been cases in which the sales price to the Bank of California was the approximate equivalent of the then general market price. I do not know of any where the price to the bank was higher than the general market price. It would be approximately the same or a little less. This eight point spread is an exceptional case be- [68] cause at that time our inventory was very low and we passed that on to the bank as additional protection for the bonds on which they had no liability.

We never attempted to substitute other bonds for those held by the bank under a repurchase agreement, without the execution of a new agreement. No agreement that we might do so was ever made. As to whether any agreement was ever made with the bank concerning these transactions other than the repurchase agreement itself—none, except it was understood between ourselves and the bank that if they had funds for investment from time to time, that if agreeable to them, we could sell certain bonds on repurchase agreement. To my knowledge R. H. Moulton & Company never entered into any agreement with the bank covering a particular repurchase transaction in any form other than that evidenced by the printed form, nor did R. H. Moul-

(Testimony of J. V. Jacobi.)

ton & Company to my knowledge ever receive any interest, or any refund, or any payment of any kind from the Bank of California obtaining the bonds held under repurchase agreement other than the actual agreed interest computed at the coupon rate, which was paid in the first instance when the bank purchased the bond. We never received any coupon return on any bonds held under repurchase agreement.

Redirect Examination

On redirect examination the witness testified:

The entries as to which I testified a while ago concerning certain bonds purchased by our company from R. H. Moulton & Company, New York, in the amount of $10,000 involved State of California State Building, 4 per cent bonds. As to the general form and running of the transactions through the books, those entries are typical of all our entries in our books with respect to transactions between R. H. Moulton & Company and the Bank of California in [69] connection with alleged sales to the Bank and repurchases by R. H. Moulton & Company.

Here the Commissioner rested.

The testimony of the witnesses having been concluded the following colloquy took place:

Mr. BUTLER: If your Honor please, through a misapprehension, our petitions allege that all of

these transactions for 1928 and 1929 between the Bank of California covering repurchase agreements were with R. H. Moulton & Company. In examining the records recently, it developed there were a few transactions with others, and I have so notified Mr. Thomas. They were, however, along precisely the same lines. In order that the petitions may not contain an innocent misstatement, I would like to make the motion, if I may, that it be amended to read that wherever R. H. Moulton & Company appears as the party to the repurchase agreement with the bank, the words may be added, or the words may be substituted, "R. H. Moulton & Company and other investment dealers."

The MEMBER: There is no objection to that, I assume?

Mr. THOMAS: No objection.

The MEMBER: The record will so stand. [70]

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

V. K. BUTLER, Jr.,
VINCENT BUTLER,
Attorney for Respondent on Review.

[Endorsed]: Lodged Dec. 26, 1934.

[Endorsed]: Approved and Ordered Filed this 31st day of Dec., 1934.

(Sgd) ERNEST H. VAN FOSSAN,
Member.

[Endorsed]: Filed Dec. 31, 1934. [77]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Board in each case.

2. Pleadings before the Board, in each case,

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed, including attached Exhibits Nos. 1 to 3 inclusive.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. [Not included in record.]

7. This praecipe, together with proof of service of a copy of praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 20th day of December, 1934.

V. K. BUTLER, Jr.,
Attorney for respondent.

[Endorsed]: Filed Dec. 28, 1934. [78]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 78, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of January, 1935.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7739. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. The Bank of California, National Association, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 12, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7739

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
NORMAN D. KELLER,
LOUISE FOSTER,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7739

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, respondent

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

OPINION BELOW

The only previous opinion in this case is the opinion of the Board of Tax Appeals (R. 32–44), reported in 30 B. T. A. 556.

JURISDICTION

This petition for review involves income taxes for 1928 and 1929 in the amount of $2,439.76 and $1,620.52, respectively (R. 33), and is taken from the decision entered July 23, 1934 (R. 44–45). The case is brought to this Court by a petition for review filed October 9, 1934 (R. 45–52), pursuant

to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

Whether or not the taxpayer should include as taxable income interest received by it in 1928 and 1929 on tax-exempt securities which were subject in its hands to repurchase agreements given simultaneously with bills of sale conveying these securities when turned over to the taxpayer.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 21. NET INCOME.
>
> "Net income" means the gross income computed under section 22, less the deductions allowed by section 23.
>
> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from * * * interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> (b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * *

(4) *Tax-Free Interest.*—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. * * *

STATEMENT

The facts as found by the Board of Tax Appeals (R. 33–37, 43) are as follows:

The respondent is a national banking association, organized and existing under the National Bank Act of the United States, with its principal banking office in San Francisco, California (R. 33).

During 1928 and 1929 the respondent purchased from R. H. Moulton & Company and other investment dealers certain tax-exempt, state, Federal, and municipal bonds and obligations of other political subdivisions. The purchases were made either upon the application of the investment bankers, who held or had commitments for large blocks of bonds which they could not carry themselves, or upon

the request of the respondent, which had available surplus funds desirable for use in obtaining short-term investments. The purchase price was based on, but usually under, the market price plus accrued interest to the date of sale at the coupon rate. Upon the payment of the agreed price, the securities were delivered to the respondent under a bill or memorandum of sale (R. 33). Simultaneously, the respondent and the "seller" entered into the following standard form of agreement, the blanks being filled in to constitute a typical case (R. 34–35):

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller," agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer," agrees to buy the following bonds, namely:

$7,000 CITY OF HANFORD MUNICIPAL IMPROVEMENT 5% BONDS

Numbers and denominations as follows:

$2,000	Aug. 1,	1958,	Nos.	173/74
4,000	"	1961,	"	186/89
1,000	"	1963,	"	199

The purchase price of each bond is as follows (Plus accrued interest):

August 1,	1958	maturity	@ 95
"	1961	"	@ 95
"	1963	"	@ 95

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 11th day of July 1929.

THE BANK OF CALIFORNIA, N. A.
STUART F. SMITH,
Vice-President.
R. H. MOULTON & COMPANY,
By ELMER BOOTH.

No special conditions other than those set forth in the contracts motivated the actions of the parties

(R. 43). These transactions were entered on the respondent's books as a credit to the seller at the full amount of the purchase price plus accrued interest and were listed and carried in an account called "Bond Account No. 2", to facilitate their expeditious handling. The respondent treated its bonds held under the repurchase agreements exactly as it did all its bonds and other investments. Upon the maturity of a coupon attached to a bond it was collected by the respondent and the proceeds credited to the account "Interest on Investments" on its general ledger. In that account all interest from bonds of whatever nature owned by the respondent was entered. In its call and semiannual statements the bonds subject to repurchase were included in its list of bonds and other investments owned by it. The long-term investments carried by the respondent in its "Bond Account No. 1" and its short-term investments entered in its "Bond Account No. 2" were treated exactly alike from an accounting viewpoint. Likewise, the interest derived from both classes of investments was so treated. The practice was not challenged by the Comptroller of the Currency (R. 35-36).

The sale price set in the repurchase agreement was always exactly the same as the original purchase price. The respondent and the investment dealer adhered strictly to the terms of the repurchase agreement. No supplementary agreement was made to enlarge, modify, or in any way to affect the original agreement or the acts of the parties

thereunder. If the bonds were not repurchased at the expiration of the period named in the agreement no extension was given, but occasionally an entirely new agreement was executed, accompanied by a new bill of sale at a price based on the current market. At times the respondent did not agree to a new contract and the bonds would be repurchased by the dealer and sold to another bank. Often the dealer would repurchase only a portion of the bonds at one time but would continue at intervals to repurchase until all were taken back (R. 36).

The yield to the respondent under the repurchase agreements was less than that received from collateral loans. The respondent often made loans to customers with tax-exempt securities as collateral (R. 37).

The respondent kept its books on the accrual basis (R. 37).

The amount of interest in controversy, aggregating $20,331.40 and $14,731.98, respectively, during the years 1928 and 1929, was computed by adding the amount of the matured coupons actually cashed by the respondent, the amount of the accrued interest received by it upon resale, and the amount of interest accrued on the bonds held by the respondent at the close of the year, and subtracting therefrom the amount of accrued interest paid by the respondent upon the original purchases from the investment dealers (R. 37).

Other facts in the case which are not covered by the Board's findings, or do not agree with such findings, but which appear in the statement of evidence (R. 54–95) are as follows:

The transactions involving the bonds here were handled by respondent's "note department" (R. 56, 67). The amount of money a national bank can lend a customer is limited by Federal law to ten percent of its capital and surplus (R. 73, 84, 87–88). By using the plan of repurchase agreements, a bank can advance more money to its customers than the law allows it to place on loans (R. 73). The bonds held here were always repurchased by the dealer who turned them over originally to the respondent (R. 75, 81). The price agreed upon for the bonds was "less than the market price, * * * probably one to five percent" (R. 78). R. H. Moulton & Company, the firm which was the dealer here, found it necessary "to borrow substantial sums of money in order to carry these bonds" and found it had to finance its business "through borrowings, or through the sale of the bonds, the temporary sale and repurchase of the bonds" (R. 80). Ninety-nine percent of the dealer's business was done through purchase and repurchase agreements (R. 80). The vice-president of R. H. Moulton & Company stated that the bank was really carrying that dealer's inventory for it (R. 83). "Very frequently these so-called 'sales' to the bank and 'repurchase agreements'

were entered into contemporaneously with the purchase of bonds by R. H. Moulton & Company" (R. 81). If that dealer wanted to purchase bonds and needed money it would sometimes make arrangements with the bank whereby the bonds it purchased could be sold to the bank under an agreement allowing the dealer to repurchase them but there was not always a prior understanding because owing to a more or less constant market for this type of sale and repurchase the dealer could make a commitment on bonds and then arrange with the bank for money (R. 81). If the dealer sold some of these bonds to its customers it would repurchase them from the bank (R. 82), and the bonds which were involved here were carried on the books of R. H. Moulton & Company as assets of that company, and the contingent liability for their repurchase was carried as its liability (R. 91–92).

The Board held that the respondent owned these bonds and that the interest received by it was tax exempt. Accordingly the Board decided that no deficiencies were due for 1928 and 1929 (R. 45).

SPECIFICATION OF ERRORS TO BE URGED

The petitioner's assignments of error (R. 49–51) are incorporated herein fully by reference, but for convenience the assignments are merely summarized here as follows:

The Board of Tax Appeals was in error in holding that the interest received by the taxpayer was exempt from taxation; in failing to hold that the

interest in question was received by the taxpayer on loans to customers; in holding that the securities in question were purchased by the taxpayer; in finding that the taxpayer treated the bonds held under the repurchase agreements as it did all its other bonds; in failing to find that the repurchase agreements were always carried out; in finding that no special conditions other than those set forth in the contracts motivated the actions of the parties; in failing to find that the investment company treated the bonds as its own and that the money for its original purchases was frequently furnished by the taxpayer, and in deciding that there are no deficiencies in tax for 1928 and 1929.

SUMMARY OF ARGUMENT

The Board of Tax Appeals was in error in holding that the respondent was the owner of the bonds here involved during the taxable years and also in deciding that the interest received therefrom was tax exempt. The respondent secured the bonds as the result of transactions called sales but at the same time the parties executed repurchase agreements providing for repurchase by the investment dealer who originally "sold" the bonds. These agreements fixed the price below the market value and at exactly the same figure for the sale to the respondent as for the repurchase by the dealer. They also made the obligation to repurchase absolute. These terms show that the parties did not

intend to make outright sales but merely to make loans with the bonds given as security. This is further indicated by the testimony to the effect that the parties wanted to make loans, but owing to a limitation placed by the National Banking Act on the amount of loans a national bank can make they found it necessary to adopt the plan used here for advancing money.

It is well established that what purports to be a sale on its face may be a mortgage or a pledge and that the intention of the parties should govern. When the intention of the parties here is considered, it is apparent that there were no outright sales to the respondent, and the Board was in error as to the ownership of the bonds. Also, it is clear that the interest which the respondent received was actually the price the original seller paid for loans and that such interest did not become tax exempt in the hands of the respondent merely because paid out of interest due on the bonds. The interest on the bonds would, of course, have been tax exempt in the hands of the owner, the dealer here, but the right to claim the exemption was limited to the latter. So it is immaterial that the dealer agreed to and did discharge its obligation to pay interest to the respondent with the bond interest. The situation is the same as if the dealer had used any other money, for when it came into the hands of the respondent it lost its tax-exempt character.

ARGUMENT

The question in this case relates to the taxability of certain interest received by the respondent during 1928 and 1929, but this in turn depends upon the question of the ownership of the state, Federal, and municipal bonds which are the subject of the memoranda of sale and their contemporaneous repurchase agreements mentioned above.

If these bonds were sold outright to the respondent, then it must be admitted that the respondent was the owner during the taxable years, that the interest came to it as owner of the bonds, and that it can claim the privilege of tax exemption of such interest under the provisions of Section 22 (b) (4) of the Revenue Act of 1928, c. 852, 45 Stat. 791, allowing interest on bonds like those here to be excluded from gross income but requiring the owner thereof to submit a statement as to the income received. The view just summarized represents the position taken by the respondent before the Board of Tax Appeals.

On the other hand, it is our contention that these transactions did not constitute outright sales but were loans, and that the bonds were merely used as security for such loans. Under this view of the case, R. H. Moulton & Company remained the owner of the bonds, the interest therefrom belonged to that company, and it alone can claim the privilege of tax exemption on such income. It would also follow that the relationship of the re-

spondent and R. H. Moulton & Company was that of lender and borrower, that the interest received, although taken from the interest accruing on the bonds, was money which first belonged to the latter company, that pursuant to prior agreements the money was used by that company to pay its obligation for interest to the respondent and so such interest did not come into the respondent's hands as bond interest but rather as interest on loans to a private company. Accordingly, we submit that the interest received here by the respondent comes within the provisions of Section 22 (a) of the Revenue Act of 1928, *supra*, which lists interest as one kind of income to be included in gross income.

It is admitted that the bonds were turned over to the respondent on bills of sale but the true character of the transactions cannot be determined by considering such bills of sale by themselves. This is so because, simultaneously with the giving of the bills of sale, the parties also made repurchase agreements which fixed the repurchase price at the same figure as the sale price and made repurchase an absolute obligation on the part of the original "seller." The terms of these repurchase agreements, together with other evidence in the case (which will be referred to below), make it evident that these transactions were not absolute sales but were in fact loans. Therefore, a consideration of the question here should not be confined to the terms

of the bill of sale or to statements by the witnesses that the bonds were sold. In each instance the repurchase was a part of the same transaction as the sale and so all the facts relating thereto are pertinent, as are also the facts showing the intention of the parties.

While the bills of sale show a sale absolute on their face, we submit that such fact is not determinative of the issue here nor does it preclude a consideration of the other facts in the case just referred to. It is well established that it takes more than the use of the word "sale" or other terminology connected with sales to in fact make a sale. The instrument may be well drawn and apt words used to describe a sale, yet the transaction may in fact be a loan, *Kelter* v. *American Bankers Finance Co.,* 306 Pa. 483. Where there are circumstances which cast doubt on the nature of a transaction, the courts will look beyond the terms of the written instrument. *Kiefer* v. *Myers,* 5 Cal. App. 668, 673.

Indeed, it is now universally held that what purports to be a sale on its face may be a mortgage or a pledge and in deciding the nature of the transaction the intention of the parties should be considered. *Jackson* v. *Lawrence,* 117 U. S. 679, 681; *Peugh* v. *Davis,* 96 U. S. 332, 336; *Russell* v. *Southard,* 12 How. 138, 151; *Whittemore* v. *Fisher,* 132 Ill. 243; *Robinson* v. *Farrelly,* 16 Ala. 472; *Weiseham* v. *Hocker,* 7 Okla. 250. This is also the law in California, where this case arose. *Shelley* v. *Byers,*

73 Cal. App. 44; *Sears* v. *Dickson,* 33 Cal. 326. The case of *Henley* v. *Hotaling,* 41 Cal. 22, which has been frequently relied on to show that the technical language of a conveyance should be upheld and given effect, is distinguished by the *Shelley* case, in which it is pointed out that the intention of the parties should govern and if it is the leading purpose for one of the parties to have a loan, then that should control.

The intention of the parties as expressed in their written agreements must, of course, be considered, but the above cases also held that parol evidence may be heard to determine the real character of the transaction. Evidence as to what the parties have actually done in interpreting their agreements is to be specifically noted, for as the Supreme Court said in *Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. * * * There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity.

This rule of law was also fully discussed in *Campbell* v. *Dearborn,* 109 Mass. 130. The court there referred to *Russell* v. *Southard, supra,* and commented on the doctrine as set forth in that case as follows (pp. 140, 141):

> The decisions in the federal courts go to the full extent of affording relief, even

> in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties. * * *
>
> This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void.

These general principles of law in regard to the interpretation of agreements are in accord with the well established rule of tax law that the substance, not the form, of a transaction should govern and that a transaction may not be divided into parts in order to avoid the tax which would otherwise

be due. *Weiss* v. *Stearn,* 265 U. S. 242, 254; *First Seattle D. H. Nat. Bank* v. *Commissioner,* 77 F. (2d) 45 (C. C. A. 9th); *San Joaquin Fruit & Inv. Co.* v. *Commissioner,* 77 F. (2d) 723 (C. C. A. 9th).

So it is our contention that each sale and its contemporaneous repurchase agreement was a part of the same transaction and must be considered together and that actually such transactions are loans. As commonly defined, the word "loan" implies money advanced and an obligation to pay back. The word "sale" means an absolute transfer of property or something of value from one person to another for a valuable consideration. *Alworth-Washburn Co.* v. *Helvering,* 67 F. (2d) 694, 696 (App. D. C.); *Omaha Nat. Bank* v. *Mutual Ben. Life Ins. Co.,* 81 Fed. 935, 939 (N. J.); *In re Grand Union Co.,* 219 Fed. 353, 366 (C. C. A. 2d). As to the difference between a sale and a loan, it was stated in *Robinson* v. *Farrelly, supra* (p. 477):

> If the purchaser retain the right to demand the money of the vendor, notwithstanding his purchase, a debt is then due from the vendor to him, and the existence of this debt within itself shows that the conveyance is a mere security for its payment.

A further distinction was pointed out in *Campbell* v. *Dearborn, supra,* in which it was said that if the purchaser does not take the risk of the subject of the contract upon himself but takes security for repayment of the principle, there has been no sale.

Applying these tests to the instant case, it seems clear that loans were made by the respondent. In every instance, when a bill of sale was given a repurchase agreement also was executed (R. 33, 57–60). The latter agreement fixed the price for the repurchase by the dealer, R. H. Moulton & Company, at exactly the same figure as that given by the respondent on the "sale" of the bonds (R. 59–60). The respondent's vice president testified that these agreed prices were about one to five percent less than the market price (R. 78). As it is not the custom of bankers or other business men to sell property at less than its market price, the fact that the parties here adopted such prices is a strong indication that they intended to make a loan. Inadequacy of consideration has repeatedly been held to be evidence of a loan. *White* v. *Redenbaugh,* 41 Ind. App. 580; Jones on Mortgages (8th Ed.), Sec. 326.

The promise of R. H. Moulton & Company to repurchase the bonds was absolute and not optional. Each agreement stated that that company "agrees to buy the following bonds" and "agrees to pay on or before ninety days from date hereof" (R. 59). In discussing this promise the Board referred (R. 39) to it as the dealer's privilege to repurchase but such language is misleading. The dealer's position here is in no material sense different from that of a mortgagor. If a mortgagor does not pay back the loan, he loses his property and so would the dealer

here if it had not "repurchased." A mortgagor, as well as this dealer, might decide not to repay the money advanced but in either case there would be a default. Default is defined as an omission to perform an agreement. Black's Law Dictionary, 3rd Ed. Thus it is clear that default is something different from a failure to exercise an option or to take advantage of a privilege. This was understood by the parties here for in referring to the possibility of the dealer's failure to perform, the repurchase agreements used the word "default" (R. 59). So it must be assumed that the dealer had an absolute obligation to perform, that is, a duty to pay back the money advanced to it by the respondent and such duty is inconsistent with the idea of a sale. That the dealer understood its obligation as we have stated it is clearly indicated by the testimony of V. E. Breeden, vice president of R. H. Moulton & Company, who said (R. 84):

> These repurchase agreements were a definite commitment to repurchase at or before the expiration of a certain number of days. None of them were ever allowed to expire without completing the repurchase. That would be a violation of our contract.

We think that the Board was also wrong in construing the rights of the respondent under these repurchase agreements. The Board stated (R. 39) that at any time the respondent needed money it had the right to tender bonds it wished to sell, first to R. H. Moulton & Company, and then to anyone

else who would buy. Thus the Board concluded that such a right of alienation indicated ownership, but we do not agree that it could sell the bonds at any time.

As indicated above, these repurchase agreements (R. 59–60) first provide that the buyer (otherwise referred to herein as the dealer) may have ninety days in which to pay the purchase price. The agreements next state that the respondent "hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer." In the next paragraph it is provided that in the event of any failure on the part of the dealer to accept and pay for the bonds when tendered, the respondent may sell to third parties. Obviously, under these provisions, there could be no default on the part of the dealer until after ninety days. This being so there could be no failure on the part of the dealer within the meaning of the last provision just referred to until after the lapse of ninety days and so the respondent could not legally sell to third parties before the end of that period. If this is not so and the respondent could sell at any time, as the Board held, then part of the agreement is necessarily meaningless. But we do not think that it is, or that its provisions are inconsistent. Instead, we think it is clear that the respondent was under an

obligation to hold the bonds until the end of ninety days or default by the dealer. Thus, the respondent could not dispose of the bonds as an owner could.

The right of free alienation is of course the most important attribute of ownership. The dealer had such right all of the time, subject, of course, to the payment of the agreed price, which, up to ninety days, could be paid to the respondent at any time the dealer wished to do so. As a matter of fact the dealer frequently exercised its right to sell while the bonds were in the possession of respondent and would then demand their return in order to turn them over to its customer (R. 82–83). The dealer had this right of alienation to the exclusion of all others and the final test of ownership is the right to exclude all others. *Computing Scale Co.* v. *Toledo Computing Scale Co.*, 279 Fed. 648, 671 (C. C. A. 7th), certiorari denied, 257 U. S. 657.

While the respondent could not sell the bonds during the ninety days the repurchase agreements were in effect, it should be noted on the other hand that, at the end of such time, the respondent had a right to demand its money from the dealer and upon its failure to pay could get it back by selling to third parties. So it is evident that there was a debt here within the holding of *Robinson* v. *Farrelly, supra,* in which it was said that the retention by a purchaser of the right to demand money is convincing evidence of the existence of a debt.

In this connection there is a further significant fact to be noted. If the respondent had sold to third parties and had not realized the amount which it had paid the dealer in the beginning, these agreements required the latter to make good the loss. Certainly this provision is not consistent with a sale. If the respondent had purchased outright, it is difficult to understand why the dealer would be concerned in a sale by the respondent to a third party to the extent that it would guarantee the respondent against loss. In this connection it must not be forgotten that the dealer did not receive market price from the respondent in the beginning and since there is nothing to indicate that it had not paid market price, apparently it had suffered a loss in letting the respondent take them at the lower figure. So to construe these transactions as sales would mean that the dealer was willing in the first instance to make an outright sale of its bonds at a loss and then after it was no longer interested in them was still willing to pay any loss which the respondent might have on sales to a third party. The mere statement of such a view of the matter is enough to show that it could not have been what the parties intended here. Instead, the respondent simply was unwilling to take the risk of the contract but required security and this, as was held in *Campbell* v. *Dearborn, supra,* prevents these transactions from being outright sales.

The Board referred to the failure of the repurchase agreements to require the respondent to account to Moulton & Company for any profit which the former might realize on a sale of the bonds to third parties. It called attention to Section 3008 of Deering's California Civil Code (1931 Ed.),[1] providing that an accounting must be made for any surplus from the sale of collateral or under a chattel mortgage. In reply we think it sufficient to say that, assuming Section 3008 to be applicable to transactions like those here, Section 3268 of the same Code allows parties to contracts to waive certain provisions of the Code, including the Section just referred to, and it is clear that there is a waiver here since the agreements allow the respondent to sell to third parties "for the best price obtainable" (R. 60).

Another provision in the repurchase agreements which should be noted is that stating that maturing coupons are to be the property of the respondent (R. 59). If the latter had become the owner of the bonds when the so-called "sales" were made, then it would have become entitled to interest therefrom and no mention of the fact would have been necessary. The fact that the parties included the provision is an indication, we think, that they thought the interest would still belong to the dealer and that they wished it to be used as payment by the dealer for the money advanced by the respondent.

[1] The Board referred to the Code of Civil Procedure but this matter appears in the Civil Code cited above.

As to this, it may be urged that inasmuch as the respondent held the coupons, and collected this bond interest, the parties did not intend that it be treated as an interest payment from the dealer but we think that the parties settled on this as the payment in their negotiations. This is shown in the testimony of the vice president of R. H. Moulton & Company when he said (R. 83), "the prices on these repurchase agreements were settled through negotiations between the bankers and ourselves at what they felt was the current rate, or the rate in which they might be interested in making the purchase." During these negotiations, the parties obviously considered what compensation should be paid to the respondent for advancing the money and as indicated elsewhere the parties decided that it would be satisfactory to adopt the same rate of interest as paid by the bonds. Also it appears that the parties decided that it would be a convenient method of payment to allow the respondent to cash the coupons attached to the bonds held by it as security.

However, even if the provision as to interest is construed in a way most favorable to the respondent, it must be admitted that such provision raises a doubt as to the parties' intention and because of this and other doubts raised by the agreements, parol evidence should be considered. Some of the parol evidence has already been referred to but no mention has as yet been made of the reason why

the respondent used this method of advancing money rather than ordinary loans. The Board stated (R. 43) that "the record shows that no special considerations or conditions other than those set forth in the contract motivated the actions of the parties." We do not agree. There was a special reason and this was that the bank had more funds than it could legally invest in regular loans and used so-called 'sales" and "repurchases" to get around this difficulty imposed by the law.

The respondent's vice president, testifying as to this, said that his bank could place more funds with a customer by the financing method used here than by loans because banks were limited by state and national law as to the amount which they could lend to any customer, the limit being ten percent of the bank's capital and surplus, and that his bank could buy two million dollars worth of these securities while it could legally lend only a million and a half, that this method of advancing money was first adopted about 1924 or 1925, and that it was advantageous because it put the bank's clients in possession of more money than the bank could lend (R. 71, 73). This statement is also borne out by the testimony of the vice president of R. H. Moulton & Company, the other party to these repurchase agreements. This witness stated that his company always needed money since its inventory was much larger than its capital (R. 80), that it was necessary to get such money either by borrow-

ing or "through the sale of bonds, *the temporary sale* and repurchase of the bonds" (R. 80), that ninety-nine percent of its business was done on the latter plan (R. 80), that it adopted this method because there was no limitation on the amount of bonds a bank could buy (R. 83), that a bank is limited in making loans on collateral to ten percent of its capital and surplus (R. 84), that if his company had conducted its business "through collateral loans under the rules, national and state, governing banking practice, we would have been required to supply a margin for our collateral loan" (R. 87), and that if his company had "been borrowing on collateral we would have been subject to the limitations placed by the National Bank Act, or the National Act on State banks, that only ten percent of the capital and surplus of the bank would be advanced to any particular individual" (R. 87–88).

This testimony shows conclusively that there was a special motive for using the plan of repurchase agreements, but in effect loans were made and that was what the parties intended. The last witness referred to above said as much when he testified that "The bank was really carrying our inventory for us" (R. 83), and when he explained that these bonds were carried on the books of R. H. Moulton & Company as assets and the liability to repurchase as a liability (R. 92).

The same witness also referred to prior negotiations which he had had with the respondent with

the view to seeing if he could get the necessary funds advanced with which to buy bonds for his company and to determine the rates for such advances (R. 81, 83). He also stated that very frequently the repurchase agreements with the bank were made contemporaneously with the purchase of bonds by his company and if he did not make prior arrangements for funds it was because he was in a position to know there was a constant market with the banks for this type of repurchase agreement and that he could secure the funds needed (R. 81). Thus the witness showed in getting the money needed for his company's business he acted as any other business man who is seeking a loan.

A transaction similar to those here was involved in *First Nat. Bank in Wichita* v. *Commissioner*, 57 F. (2d) 7 (C. C. A. 10th), certiorari denied, 287 U. S. 636, and the court there held it was a loan although the parties themselves had called it a sale with a right to repurchase and the Comptroller of the Currency had reached the same conclusion. As the Board has pointed out (R. 39–41) the terms of the agreement in that case were somewhat different from those here but it is significant that the Comptroller of the Currency in ruling on the nature of such transactions prior to the presentation of the question to the court, said in a letter to one of the parties that the agreement could be approved as a sale but explained that he would have

decided to treat it as a loan subject to the limitations in Section 5200, Revised Statutes, *if the original vendor could have been compelled to repurchase the bonds.* Here the respondent had a right which was equivalent to compelling repurchase for if the dealer had refused to repurchase, the former could have recovered its money through sales to third parties and in case of loss could have collected the difference from the dealer. Thus under the Comptroller's ruling the transactions here should be treated as loans.

It is the policy of the law to prohibit the conversion of a conveyance for security into a sale (*Conway* v. *Alexander,* 7 Cranch 217, 236) and such policy of the law may be invoked here by the petitioner as well as in a case between parties to such transactions. In cases involving the Government's revenues, the Government is entitled to have a consideration given to all pertinent facts which will show what has actually transpired. Especially is this true in cases involving a claim to a tax exemption. Exemptions are never to be lightly inferred. Instead all doubts must be resolved against the one claiming the exemption. Thus to avail oneself of an exemption, the claim thereto must be clearly defined and based on plain language. *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491; *J. W. Perry Co.* v. *Norfolk*, 220 U. S. 472; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.

When viewed in the light of all the evidence and the principles of law discussed herein, we think it is clear that the respondent did not receive the interest here in question as owner of the bonds and is not entitled to the claimed exemption.

CONCLUSION

The decision of the Board of Tax Appeals is erroneous and should be reversed.

Respectfully submitted.

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No. 7739

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
Respondent.

BRIEF FOR RESPONDENT.

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No. 7739

IN THE

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For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
Respondent.

BRIEF FOR RESPONDENT.

THE FACTS.

From various dealers respondent purchased "tax exempt" bonds at fixed prices plus interest accrued on the bonds. To the same dealers respondent resold the same bonds, at later dates, for the same prices, plus interest accrued on the bonds. Respondent cashed and collected interest coupons maturing in the interim. Interest accruing on the bonds in the interim was received and retained by respondent for its own account.

Petitioner asserted that this interest was "taxable in accordance with the decisions in the cases of First National Bank of Wichita and Brown-Crummer Company, B.T.A. volume 19, #5, pages 745 and 750."[1]

1. R. 14.

In the instant case the Board of Tax Appeals held respondent was entitled to the exemption, saying of the *Wichita* situation:

> "The facts in the cited cases are very different from those in the case at bar * * *. There, upon the maturity of the interest coupon, the Bank clipped the coupon and delivered it to its customer; here, the petitioner collected the coupon and credited the proceeds thereof to its own interest account."[2]

ARGUMENT.

1. RESPONDENT RECEIVED NO INTEREST EXCEPT THAT ACCRUING ON THE BONDS THEMSELVES. IT CANNOT BE TAXED FOR INTEREST IT DID NOT RECEIVE.

For tax purposes, the critical question in cases of this kind is always who it was who received the tax exempt interest. On that question of fact the present record is clear beyond doubt. The petition for review itself alleges expressly that under the arrangement respondent "was permitted to collect the interest coupons on the securities while it was in possession of same."[3] The contracts provided expressly: "Maturing coupons to be the property of The Bank of California, N.A."[4] This is conclusive.

Quite irrespective of all questions regarding the ownership of the bonds themselves, it is settled that interest collected by the owner of a coupon as it matures is income of the owner of the coupon and not of the bond.

Julius Rosenwald had organized a charitable corporation. He clipped and delivered to it before maturity

2. R. 42.
3. R. 48.
4. Petitioner's Ex. 1, R. 59; see also R. 17, 30, 34.

interest coupons from certain liberty bonds. The Circuit Court of Appeals for the Seventh Circuit held that the interest on these coupons could not be taxed as part of Rosenwald's income.[5]

There can be no doubt on this point. Estates, trusts and other interests in property have produced frequent situations in which the rent, dividends, or interest—the usufruct—of property, is separated from the ultimate ownership of the property itself. Our tax law is not concerned with technical legal distinctions about the ownership of the property which produces income. Its concern is a very practical one. It merely ascertains the person who receives the income and taxes him accordingly.

The ultimate decision of the very case upon which petitioner relied turned upon this very question. The Circuit Court of Appeals for the Tenth Circuit said:

> "There is no doubt of the exemption from income taxes of the interest on these securities in favor of the person or persons who were entitled to receive it and did receive it."
>
> "Conceding that under the contract the legal title to the bonds was in the bank, the uniform conduct and practice of the parties was a joint admission *that the interest coupons and their proceeds when collected did not belong to the bank,* but were the property of Brown-Crummer Company. They were collected by Brown-Crummer Company and applied to its use and benefit. When the coupons were detached from the bonds by the bank and delivered to Brown-Crummer Company, the interest represented by them 'was no longer a mere incident of the principal indebtedness represented by the bond', and the coupons became in-

5. *Rosenwald v. Commissioner*, 33 F. (2d) 423.

dependent obligations, separate and apart from the bonds. Edwards v. Bates County, 163 U.S. 269, 272, 16 S.Ct. 967, 41 L. Ed. 155; Nesbit v. Riverside Independent District, 144 U.S. 610, 12 S.Ct. 746, 36 L. Ed. 562. *The bank got none of the interest that accrued on the bonds.* It was not entitled to it. Brown-Crummer Company paid the bank all its interest charges. The Board of Tax Appeals held that these interest charges received by the bank from Brown-Crummer Company should be included in the bank's taxable income."[6]

As we have shown, it has never been contended that anyone other than the respondent received the interest on these tax exempt bonds. Respondent's income tax, therefore, was properly adjusted on that basis.

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2. PETITIONER'S BRIEF DISCLOSES NO REASON FOR QUESTIONING THE RESULT REACHED BY THE BOARD.

(a) No substantial question of fact is raised.

It is not easy to ascertain the precise attitude of petitioner towards the facts. He makes an elaborate restatement of facts found by the Board,[7] and follows that with a statement of "other facts".[8] There is no definite attempt to point out wherein the Board erred so far as the facts

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6. *First Nat. Bank in Wichita v. Commissioner of Int. Rev.*, 57 F. (2d) 7, 9.

The Board's decision in that case was to the same effect.

"The question here, as we view it, is not dependent upon who held the bare legal title to the bonds during the dates of sale and repurchase, but rather upon the broader issue as to whom, under the understanding between the bank and its customers, was entitled to receive, and who, as carried out, did receive the interest payments made by the issuing authorities of such bonds when collected and paid" (*First National Bank in Wichita v. Commissioner*, 19 B.T.A. 744, 749).

7. Petitioner's Br., pp. 3-7.

8. Petitioner's Br., pp. 8-9.

are concerned. Regarding these "other facts", however, the following may be noted:

It is quite insignificant that these transactions "were handled by respondent's 'note department.'"[9] Banker's acceptances and commercial paper were carried at the note desk.[10] All these investments were assigned to that department purely for reasons of convenience.[11]

The petitioner intimates[12] that by these agreements the bank could "advance" more money than the law permitted. In the passage cited by petitioner such was not the language of the witness, but only of his interrogator.[13] The phrase the witness used was "place the funds with them", "putting our clients into possession of more money."[14] If by mentioning this point petitioner seeks to suggest that it was intended to evade the banking law, the answer is plain that that very intention would necessarily exclude any intent of evading the tax law, and the tax law is the only matter here at issue. (Of course there was no evasion of either law.) In fact, the only possible materiality of this circumstance is to rebut petitioner's position[15] that the transaction was in fact a loan by demonstrating that no such loan could legally have been made.

That the bonds "were always repurchased by the dealer"[16] is merely a statement that the parties complied with their contracts and is quite immaterial.

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9. Petitioner's Br., p. 8.
10. R. 71.
11. R. 68, 71.
12. Petitioner's Br., p. 8.
13. R. 73.
14. R. 71.
15. *Infra*, pp. 11-26.
16. Petitioner's Br., p. 8.

That the price was slightly "less than the market price"[17] is explained by "the fact that the bonds in substantial quantities did not have a ready market * * *. That is a factor which should have entered into our determination in fixing market price."[18]

The petitioner errs in quoting the record as showing that "the dealer here found it necessary 'to borrow substantial sums.'"[19] In this connection, all the witness said was: "It was necessary *to finance* the business *either* through borrowings, *or through the sale of the bonds, the temporary sale and repurchase of the bonds.*"[20]

The remaining "other facts"[21] are equally immaterial.

(b) There is no real assignment of error.

The brief fails to comply with the rule of this court that it "set out separately and particularly each error asserted and intended to be urged".[22]

The rule does not permit incorporation by reference as attempted by petitioner.[23] This reference is followed by a summary which mentions only some of the points in the assignment.[24]

The majority of the formal assignments[25] are based upon alleged failure of the Board to take certain action. The record contains nothing to show that the Board was ever asked to take any such action. Obviously error cannot be assigned.

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17. Petitioner's Br., p. 8.
18. R. 79.
19. Petitioner's Br., p. 8.
20. R. 80.
21. Petitioner's Br., pp. 8-9.
22. Rule 24, subdivision 2 (b).
23. Petitioner's Br., p. 9.
24. Petitioner's Br., pp. 9-10.
25. R. 49-50.

Seriatim the following is the situation regarding the assignments in the record:

> "1. The Board erred in holding that the interest received by the taxpayer was exempt from taxation."[26]

This is the real point in the case. Legally it is clearly untenable. The person who received the interest was undoubtedly entitled to the exemption.[27]

> "2. The Board erred in failing to hold that the interest received by the taxpayer was taxable to it."[28]

This assignment can hardly be considered. It is not mentioned in petitioner's summary.[29] Mere "failing to hold" is not error where there was no request for the holding.[30] In any event, since "the interest received by the taxpayer" was coupon interest on tax exempt bonds and necessarily exempt, the assignment is untenable. Petitioner does not argue the point. It may be taken as properly abandoned.

> "3. The Board erred in failing to find and hold that the interest in question was received by the taxpayer on loans to customers."[31]

Again, there can be no error "in failing to find and hold" anything where the Board was not asked for such a finding or holding.[32] In any event, on the present record it is clear that it would have been error for the Board to

26. R. 49.
27. *Supra*, pp. 2-4.
28. R. 49.
29. Petitioner's Br., pp. 9-10; *supra*, p. 6.
30. *Supra*, p. 6.
31. R. 49.
32. *Supra*, p. 6.

find or hold that "the interest coupons on the securities"[33] could have been "interest * * * on loans to customers".[34]

> "4. The Board erred in finding and holding that the taxpayer received the interest in question as the owner of tax exempt securities."[35]

This assignment is not mentioned in the summary[36] or elsewhere in the brief and is taken as abandoned. In any event, it can be interpreted only as having to do with the matter of title to the bonds, a purely collateral question.[37]

> "5. The Board erred in holding that the securities in question were purchased by the taxpayer."[38]

This again relates to the collateral question of title.[39] So far as evidence is concerned, the record is full of uncontradicted evidence of these purchases. See, for example, the bill of sale in Petitioner's Exhibit Number 1.[40]

> "6. The Board erred in finding that the taxpayer treated the bonds held under the repurchase agreement as it did all its bonds and other investments."[41]

This is a purely evidentiary matter. The finding, however, is directly supported by the record.[42]

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33. R. 48.
34. R. 49; *supra*, pp. 2-4.
35. R. 49.
36. Petitioner's Br., pp. 9-10; *supra*, p. 6.
37. *Supra*, pp. 2-4; *infra*, pp. 11-13.
38. R. 49.
39. *Supra*, pp. 2-4; *infra*, pp. 11-13.
40. R. 58.
41. R. 49.
42. "Our treatment of interest on what I have described as these short term investments under repurchase agreement was precisely the same as our treatment as to interest derived by the bank from investments of the long term portfolio" (R. 62).

"When the Comptroller of Currency periodically issued his call, the bonds returned by us in our statement, which were subject to repurchase agreements were handled as property of the bank, in the same way that our own—the two accounts were combined for the government comptroller reports. * * * In our statement we listed bonds held subject to repurchase agreement in the same manner as we returned all other bonds owned by the bank" (R. 66-67; see also R. 68).

"7. The Board erred in failing to find that the repurchase agreements were always carried out."[43]

Again, there can be no error in failing to make a finding not requested.[44] Any such finding, of course, would have been immaterial.[45]

"8. The Board erred in finding and holding that the taxpayer was not required to account to the Moulton Company for any surplus on a sale."[46]

This assignment is not mentioned in the summary.[47] It is directly in accord with the repurchase agreement in evidence.[48]

"9. The Board erred in finding that no special consideration or conditions other than those set forth in the contract motivated the actions of the parties."[49]

There was no evidence of any such special considerations or conditions.

"10. The Board erred in failing to find that the transactions in the form of sales and repurchases of the securities in question were occasioned by the desire of the parties to circumvent or avoid the banking restrictions under which the taxpayer in its loans on collateral to any person or firm was limited to 10% of its capital and surplus."[50]

As we have said, there can be no error in failing to make a finding not requested.[51]

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43. R. 49.
44. *Supra*, p. 6.
45. *Supra*, p. 5.
46. R. 50.
47. Petitioner's Br., pp. 9-10; *supra*, p. 6.
48. Petitioner's Ex. No. 1, R. 59-60.
49. R. 50.
50. R. 50.
51. *Supra*, p. 6.

In any event, the finding could only have been either immaterial or in our favor.[52]

> "11. The Board erred in failing to find that at all times R. H. Moulton & Company treated the securities in question as its own."[53]

Again, failure to make a finding not requested cannot be error.[54] No such finding could have been supported by the evidence. Moulton & Company conveyed the bonds by bill of sale[55] and subsequently repurchased them by bill of sale.[56] It permitted respondent to collect and retain the interest accruing in the meantime.[57] In any event, whatever Moulton did could not be binding upon respondent or subject it to a tax not warranted by its own conduct.

> "12. The Board erred in failing to find that very frequently the taxpayer furnished the money to R. H. Moulton & Company to make the original purchase of the tax-exempt securities."[58]

Again, failure to make a finding not requested cannot be error. The finding could not have been material.

> "13. The Board erred in failing to find that in many instances R. H. Moulton & Company sold to its customers some of the securities held by the taxpayer and would exercise the repurchase agreement to the extent of obtaining securities necessary for delivery to the customer."[59]

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52. *Supra*, p. 5; *infra*, p. 16.
53. R. 50.
54. *Supra*, p. 6.
55. Petitioner's Ex. No. 1, R. 58.
56. Petitioner's Ex. No. 2, R. 64-66.
57. R. 48; *supra*, p. 2.
58. R. 50.
59. R. 50.

Again, failure to make a finding not requested cannot be error. The finding could not have been material.

> "14. The Board erred in holding and deciding that there are no deficiencies in tax for the years 1928 and 1929."[60]

This is a mere general assignment.

> "15. The Board erred in not holding and deciding that there are deficiencies in tax for the years 1928 and 1929 in the respective amounts of $2439.76 and $1620.52."[61]

This also is a purely general assignment.

(c) Petitioner's argument cannot warrant reversal.

The argument is simply that these were not sales and repurchases but loans and mortgages or pledges.[62] It is also apparent, since the Board has found the facts against petitioner, that he must argue that his contention about the character of these transactions follows necessarily as a matter of law from the very transactions themselves.

(1) The argument is beside the point.

From what we have said[63] it is apparent that the decision of this tax case cannot turn upon the question argued in petitioner's brief, upon whether or not these transactions were sales and repurchases or loans and mortgages or pledges, upon any question regarding the ownership of the bonds, but upon the fact that respondent received the interest and owned the interest. Petitioner's "summary of argument"[64] discloses an unconscious re-

60. R. 50.
61. R. 50-51.
62. Petitioner's Br., p. 12, et seq.
63. *Supra*, pp. 2-4.
64. Petitioner's Br., p. 10.

alization of the fact that the reversal of the case certainly required the establishment of some legal principle beyond that argued in the brief. He says: "It is clear that the interest which respondent received was actually the price the original seller paid for loans."[65] Even if it were the fact that the coupons, the right to receive and retain the interest, became respondent's property as a condition of or consideration for a loan, it cannot follow that for that reason the interest received on these coupons lost its tax exempt character. Petitioner proceeds: "That such interest did not become tax exempt in the hands of the respondent merely because paid out of interest due on the bonds."[66] This loses sight of the fact that no one is claiming that the interest should "become tax exempt." The interest was tax exempt by virtue of the character of the bonds to which the coupons were originally attached. It was tax exempt in the hands of the person entitled to collect it. To say that "such interest" was "paid out of the interest due on the bonds" is to make an assumption contrary to the established facts. The only interest here involved is the "interest due on the bonds." Nothing was "paid out" of this interest. This interest itself was simply paid to and retained by the respondent.[67] It did not become tax exempt. It always was tax exempt.

Petitioner's summary states that "the right to claim the exemption was limited to the latter"—the owner of the bonds.[68] For that statement no authority is cited. There is none.

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65. Petitioner's Br., p. 11.
66. Petitioner's Br., p. 11.
67. R. 48; *supra*, p. 2.
68. Petitioner's Br., p. 11.

Apart from this "summary" there is nothing in the brief, nothing in the argument itself, except the statement that "Moulton & Company remained the owner of the bonds, the interest therefrom belonged to that company, and it alone can claim the privilege of tax exemption on such income".[69] To say that "the interest therefrom belonged to" Moulton is simply to make an assertion directly contrary to the record, which shows "maturing coupons to be the property of The Bank of California, N. A.".[70] To say that Moulton "alone could claim the privilege of tax exemption" is to state a mere conclusion directly contrary to the decided cases,[71] for which petitioner offers neither argument nor authority.

(2) The transaction was not a loan, not a mortgage, not a pledge.

As we have seen, petitioner's position is that as a matter of law the transaction, which on its face purported to be a sale and repurchase, could not have been what it purported on its face to be, what the parties intended it to be, but on some legal principle must be given a different character. There is no such legal principle. In proper cases, of course, deeds have been given the effect of mortgages. The very cases, however, upon which petitioner relies in support of this, establish not only that it is not a universal principle of law but that it cannot be applied to circumstances like those at bar.

The leading case is *Conway v. Alexander*.[72] That case involved a conditional sale of land. In reversing the con-

69. Petitioner's Br., p. 12.
70. Petitioner's Ex. No. 1, R. 59.
71. *Supra*, pp. 2-4.
72. 7 Cranch 218. Petitioner's Br., p. 28.

clusion of the lower court that the sale should be treated as a mortgage Marshall, C. J., said:

> "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, or, in other words, to make a sale, with a reservation to the vendor, of a right to repurchase the same land, at a fixed price, and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are certainly not prohibited, either by the letter or the policy of the law. * * * But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money, or an actual sale?"[73]

The asterisks in this passage represent what is probably the portion of the opinion for which petitioner cites it. Petitioner propounds the decision as holding that "It is the policy of the law to prohibit the conversion of a conveyance for security into a sale".[74] This is not what Marshall, C. J., said. His words were "But the policy of the law does prohibit the conversion of a *real mortgage* into a sale". Whether or not we have a "real mortgage" can only be determined by a consideration of all the circumstances. It is not a legal principle that every sale and repurchase is necessarily a loan and mortgage.

Several of the circumstances relied upon by the court in *Conway v. Alexander* have striking parallels in the case at bar.

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73. P. 237.
74. Petitioner's Br., p. 28.

Marshall, C. J., pointed out: "There is no acknowledgment of a pre-existing debt".[75] In the instant case there was no pre-existing debt.

Marshall, C. J., held that it was "a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor".[76] In that case there was no such remedy, because there was no covenant to repay. Petitioner insists, of course, that in the instant case he can find "repurchase an absolute obligation on the part of the original 'seller' ", that "the promise of R. H. Moulton & Company to repurchase the bonds was absolute and not optional".[77] This obligation, however, did not create a debt, did not permit a "remedy against the person of the debtor". The contract here involved was a sale, not of realty, but of personalty. It could not be enforced specifically by the seller. It was limited to an action for damages, "the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted",[78] or the alternative remedy given by the contract itself to "sell * * * charging the loss, if any, to the account of the Buyer".[79]

Proceeding, Marshall, C. J., emphasized:

> "It is certain, that this deed was not given to secure a pre-existing debt."[80]

75. P. 237.
76. P. 237.
77. Petitioner's Br., pp. 13, 18.
78. Civ. Code, section 1784.
79. Repurchase Agreement, Petitioner's Ex. No. 1, R. 60.
80. P. 238.

So here.

"There is not, however," said Marshall, C. J., "a syllable in the cause, intimating a proposition to borrow money, or to mortgage property."[81] So here.

Again the court said:

> "To this circumstance, the court attaches much importance. Had there been any treaty—any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage."[82]

Such is the situation here.

> "It is not entirely unworthy of notice," said the court, "that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. * * * His not being in the practice of lending money, is certainly an argument against his intending this transaction as a loan."[83]

In the instant case the bank could not have made such a loan to Moulton.[84]

The instant case is stronger than the *Conway* case because of the absence of those very circumstances which Marshall, C. J., thought might raise some doubt. "The sale," said he, "on the part of Alexander, was not completely voluntary. He was in jail, and was much pressed for a sum of money."[85] Moulton, however, was not in

81. Pp. 238-239.
82. P. 239.
83. P. 239.
84. *Supra*, p. 5.
85. P. 240.

jail—was one of the most responsible financial houses in the community.

"The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended."[86] In the instant case the price represented the fair market for blocks of securities of this kind.[87]

Henley v. Hotaling followed the same principles.[88] The case resembles that at bar to some extent in the circumstance that there the sale was made by an agent whose power of attorney did not permit him to mortgage, while here the purchase was made by a bank organized under laws which did not permit it to lend.[89]

Equally pertinent to this case would have been the remark of that maker of California legal history in the *Hotaling* case:

> "The parties gave me positive instructions to have it a sale, and not a mortgage, and if those papers make it anything else, then the papers did not perform the object of the parties and their transaction."[90]

The court said:

> "When the intention of the parties to a deed, absolute in form, is sought to be ascertained, not in the usual way, by reading and construing the instrument, in connection with evidence to identify the subject-matter, the parties, etc., but by evidence to establish an equity beyond and outside of the deed, and thus to convert the deed into a mortgage, the evi-

86. P. 241.
87. *Supra*, p. 6.
88. 41 Cal. 22; Petitioner's Br., p. 15.
89. *Supra*, p. 5.
90. P. 26.

dence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail. *There can be no question that a party may make a purchase of lands either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute rule that the covenant to reconvey shall be regarded, either in law or equity, as a defeasance.* The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but standing alone, it is not sufficient to work that result. The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the intention of the parties, it is not the duty of the Court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and Courts would depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage.''[91]

The court then quoted the language of Marshall, C. J., in *Conway v. Alexander.*

Quite similar is *Felton v. Grier.*[92] That is a strong case because the repurchase obligation was actually represented

91. Pp. 26-27.
92. 109 Georgia 320, 35 S. E. 175.

by promissory notes. Discussing a remark of Chancellor Kent's, Lumpkin, P. J., said:

> "We cannot believe the author of this rule ever meant to assert that if two sane persons, legally capable of contracting, knowingly, voluntarily, and actually intended to make an agreement by the terms of which one should sell property to the other for cash, receive the money, and bind himself to repurchase at a higher price, payable in the future, they could not possibly accomplish their design."[93]

He quoted the remarks of Marshall, C. J.,[94] and continued:

> "As above indicated, that question, reduced to its last analysis, is simply this: Is it a legal impossibility for two parties to agree between themselves that one shall buy property from the other for cash, and contemporaneously contract to resell, in consideration of the original seller's binding undertaking to repurchase on time at an advanced price. * * * It is settled for us that Grier and Felton did exactly what the jury said they did, and we simply hold that it is within the power of rational and independent adults, if they really desire and intend to do a thing of this kind, to legally accomplish their purpose. We cannot undertake to say it is absolutely out of the question for such a transaction to take place. It would be tantamount to holding that a fact actually accomplished was an impossibility."[95]

In at least one element which petitioner has emphasized[96] the case at bar also resembles *Wallace v. John-*

93. P. 177.
94. *Supra*, pp. 14-16.
95. P. 178.
96. *Supra*, p. 6.

stone.[97] The court there held that the transaction was a sale and not a mortgage and disposed of petitioner's contention saying:

> "But it is urged by appellant's counsel that the disparity between the price paid for the lands and their actual value shows the transaction to be a loan, and not a purchase. The evidence on this subject is at first view contradictory; some of the witnesses putting a market value per acre of such lands in large lots at the price paid for them by the appellees; others stating their value to be from $2.50 to $3.00 per acre. The real fact, taking all the testimony together, seems to be that those lands, when sold in small areas to actual settlers for the purposes of habitation, would bring the higher prices, whilst in large quantities they could be sold to speculators, for profit, only at the lower prices."[98]

Under similar circumstances, a conveyance of land was held to be a sale and not a mortgage.[99] Apparently for the reason we have noted,[100] such decisions are even more frequent, where, as here, the sale was of personalty.[101] These cases of agreements of this kind regarding personalty are, as we have said,[102] of great importance in determining the case at bar, which also regards personalty. A sale of realty is specifically enforcible. When the contract is executed an equitable conversion occurs. This is

97. 129 U. S. 58.
98. P. 64.
99. *Mitchell v. Wellman,* 80 Ala. 16.
100. *Supra,* p. 15.
101. *Beck v. Blue,* 42 Ala. 32;
Morris v. Angle, 42 Cal. 236;
Poindexter v. McCannon, 16 N. C. 331;
Brennan v. Crouch, 10 N. Y. S. 419, 57 Hun. 585, affirmed 125 N. Y. 763, 26 N. E. 620;
Youssoupoff v. Widener, 246 N. Y. 174, 158 N. E. 64.
102. *Supra,* p. 15.

not true with personalty. A suggestion in *Morris v. Angle*[103] may well be applicable here. Suppose while the bank held them subject to the repurchase agreement, the bonds had been stolen, lost or destroyed. Respondent then would not have been able to tender the bonds to the dealer when the date fixed for repurchase came. Since the dealer had no liability except to repurchase, since no debt apart from the obligation to repurchase existed, the loss would have fallen upon respondent. This circumstance alone shows the essential difference between the transactions which actually occurred between the dealer and respondent and the loan and mortgage or pledge to which petitioner seeks to assimilate them.

(3) Petitioner's authorities do not support his contention.

Kelter v. American Bankers' Finance Co.[104] held certain assignments were in fact security for a loan. The court went into all the circumstances and relied largely upon the outstanding one, that as in the *Hotaling* case,[105] there was actually an interest charge made by the lender to the borrower. The case does not hold, petitioner indeed does not claim that it holds, that every sale of securities with the right of repurchase is a loan and not what it purports to be.

Keifer v. Myers[106] held a transfer of stock a pledge and not a sale. It is based upon the fact that the transferee gave no consideration for the stock and did not cancel the existing liability of the transferor to him, that there was no fixed price for the repurchase and above all that

103. *Supra*, p. 20.
104. 306 Pa. 483, 160 Atl. 127; Petitioner's Br., p. 14.
105. *Supra*, p. 17.
106. 5 Cal. App. 668; Petitioner's Br., p. 14.

the transferor "was chargeable with interest and credited with dividends".[107] The case is essentially different from ours.

Jackson v. Lawrence[108] and *Peugh v. Davis,*[109] were simple cases of deeds admittedly intended as mortgages.

In *Russell v. Southard*[110] the evidence was conflicting and the court held in favor of the witnesses who testified a mortgage was intended.

In *Whittemore v. Fisher*[111] the evidence was clear and explicit that no sale was intended, but merely security.

In *Robinson v. Farrelly*[112] the demurrer admitted that a mortgage was intended. Petitioner quotes a passage from this case which lays down as the determinative test the question, if there is a debt, whether the purchaser has "the right to demand the money of the vendor". As we have seen,[113] respondent here had no such right, only the right to tender the bonds on the day fixed for the sale and if the dealer did not take them, to sue for damages.

In *Weiseham v. Hocker*[114] the evidence showed conclusively that the conveyance was made to secure an existing indebtedness.

Shelley v. Byers[115] involved an instrument which, on its face, presented an ambiguity whether a sale or pledge was intended. The court construed the instrument itself

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107. P. 673.
108. 117 U. S. 679; Petitioner's Br., p. 14.
109. 96 U. S. 332; Petitioner's Br., p. 14.
110. 12 How. 138; Petitioner's Br., p. 14.
111. 132 Ill. 243, 24 N. E. 636; Petitioner's Br., p. 14.
112. 16 Ala. 472; Petitioner's Br., pp. 14, 17, 21.
113. *Supra*, pp. 15, 20-21.
114. 7 Okla. 250, 54 Pac. 464; Petitioner's Br., p. 14.
115. 73 Cal. App. 44; Petitioner's Br., pp. 14-15.

and concluded it was a pledge. The case is essentially different from that at bar.

In *Sears v. Dixon,*[116] there was a provision for rent of land equivalent to interest, and the court held on account of this and other matters disclosed by the evidence the transaction was a mortgage.

Henley v. Hotaling,[117] has already been discussed.[118]

Insurance Co. v. Dutcher,[119] involves no question of sales or mortgages. It is simply an authority in favor of the principle of practical construction. In the instant case there was no evidence of a practical construction different from the provisions on the face of the instruments—a sale and repurchase.

Campbell v. Dearborn,[120] is another case where a loan actually existed and the evidence showed the intent to secure it by the conveyance. Petitioner ascribes to it as the test the question whether "the purchaser does not take the risk of the subject of the contract upon himself." We have shown that in the instant case respondent did have to stand the risks.[121] Petitioner makes this case a text for an argument[122] based upon the provision in the repurchase agreement authorizing respondent on default to sell the bonds and charge the loss to the dealer. This is not essentially different from the measure of damages for breach of a contract of sale provided by the Code itself.[123]

116. 33 Cal. 3; Petitioner's Br., p. 15.
117. 41 Cal. 22; Petitioner's Br., p. 15.
118. *Supra*, p. 17.
119. 95 U. S. 269; Petitioner's Br., p. 15.
120. 109 Mass. 130; Petitioner's Br., pp. 15, 17, 22.
121. *Supra*, p. 21.
122. Petitioner's Br., p. 22.
123. *Supra*, p. 15.

Weiss v. Stearn,[124] was not, as petitioner intimates, a case of attempted tax avoidance. It involved no question of distinguishing between sales and mortgages, no question of construction of contracts.

Neither *First Seattle D. H. Nat. Bank v. Commissioner of Int. Rev.,*[125] nor *San Joaquin Fruit & Inv. Co. v. Commissioner of Int. Rev.,*[126] presented a question regarding the distinction between sales and mortgages.

Alworth-Washburn Co. v. Helvering,[127] expressly refrained from determining whether the transaction was a sale or a loan.

There was no question of a sale in *Omaha Nat. Bank v. Mutual Ben. Life Ins. Co.*[128] The certificate there showed expressly that there was a loan and lien.

In re Grand Union Co.[129] was another case where the finance company charged interest, etc., and for that and because of other circumstances appearing on the face of the documents the court held the transaction was a loan and not a sale.

In *White v. Redenbaugh,*[130] the court held the transaction a mortgage because of the fact of a pre-existing debt, because the seller was required to continue interest payments, to pay taxes on the land and any other liens. Petitioner ascribes to this case the test of inadequacy of consideration. In the case at bar, however, the consideration

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124. 265 U. S. 242; Petitioner's Br., p. 17.
125. 77 F. (2d) 45; Petitioner's Br., p. 17.
126. 77 F. (2d) 723; Petitioner's Br., p. 17.
127. 67 F. (2d) 694; Petitioner's Br., p. 17.
128. 81 Fed. 935; Petitioner's Br., p. 17.
129. 219 Fed. 353; Petitioner's Br., p. 17.
130. 41 Ind. App. 580, 82 N. E. 110; Petitioner's Br., p. 18.

was adequate in every instance.[131] Neither this nor any of the cases cited by petitioner and reviewed above undertakes to establish what can be the only basis of petitioner's claim here that as a matter of law a sale and repurchase must necessarily be a loan and mortgage or pledge. The fact is that the federal cases relied upon by petitioner do not question *Conway v. Alexander*[132] and that the California decisions upon which he relies do not question *Henley v. Hotaling*.[133] Both of these cases are definite authorities in favor of our position here.

In addition to these cases petitioner cites Jones on Mortgages.[134] The passage cited deals merely with inadequacy of price. It says expressly that "inadequacy of price to be of controlling effect must be gross." In the case at bar the price, we submit, was adequate. Certainly it cannot be pretended that it was grossly inadequate.

Computing Scale Co. v. Toledo Computing Scale Co.[135] is a patent infringement case. It has nothing to do with either sales or mortgages. Primarily, petitioner seems to cite it in connection with an argument[136] to the effect that respondent could not sell the bonds and therefore did not own them. The case deals neither with sales nor ownership and therefore does not support the argument. The argument itself is fallacious. The minor premise is mistaken. Respondent certainly could have sold the bonds. Doing so might have made it liable to the dealer for breach of contract if it could not deliver similar bonds when the

131. *Supra*, pp. 6, 20.
132. *Supra*, p. 13.
133. *Supra*, p. 17.
134. 8th ed., sec. 326; Petitioner's Br., p. 18.
135. 279 Fed. 648; Petitioner's Br., p. 21.
136. Petitioner's Br., pp. 20-21.

dealer called for them and tendered the price. This does not mean, however, either that respondent could not have sold the bonds or did not own them. The major premise also is mistaken. The power to alienate is not the necessary test of title. Inalienable titles are common. Suppose the owner of land gives an option to a real estate dealer who records the document. The owner can no longer alienate. The real estate dealer, like the bond dealer, could always obtain and pass good title by exercising his option and tendering the price. No one, however, would say that the real estate dealer had title. No one would question the fact that the owner had title.

First Nat. Bank in Wichita v. Commissioner of Int. Rev.,[137] we have already discussed.

The same is true of *Conway v. Alexander.*[138]

In conclusion, petitioner cites three cases[139] construing certain exemptions from taxation under state laws. These cases are not applicable here. We have not here any doubt about the tax exempt character of the bonds in question. That is conceded by petitioner.[140] Petitioner's argument is devoted to the ownership of the bonds in question. To such a question these decisions have no relevancy whatever.

137. 57 F. (2d) 7; Petitioner's Br., p. 27. *supra*, pp. 3-4.
138. 7 Cranch 217; Petitioner's Br., p. 28, *supra*, p. 13.
139. *Pacific Co. v. Johnson*, 285 U. S. 480; *J. W. Perry Co. v. Norfolk*, 220 U. S. 472; *Bank of Commerce v. Tennessee*, 161 U. S. 134; Petitioner's Br., p. 28.
140. R. 46.

CONCLUSION.

The situation presented by this record is simple in the extreme. The bonds in question bore interest coupons entitling the holder to interest. That interest was exempt from the income tax. There was no doubt of the exemption. That very exemption made the bonds sell at a higher price so that the income yielded by them was less than a lender would require on ordinary loans, whose interest was subject to income tax. Relying on that exemption, respondent bought the bonds at prices which made them yield less income than it would have received on an ordinary loan. Petitioner seeks now to tax the interest and deprive respondent of the benefit of the exemption for which it paid. Petitioner's argument is that while respondent did buy the bonds and pay for them, nevertheless it is to be taxed as if it had not bought the bonds, as if the price it had paid for the bonds was merely a loan made to the dealer. The theory is directly contrary to the language of the instruments, to the intention of the parties, to the findings of the Board and to the general rule as laid down by decisions both of the Supreme Court of the United States and of the State of California. Even assuming, however, everything for which petitioner contends, granting for the sake of argument that respondent did not own the bonds but that the dealer held title to them all the time, this cannot change the fact admitted by petitioner himself that it was respondent who collected the coupons, who received the interest on the tax exempt bonds. Irrespective of the ownership of the bonds themselves, it is well settled under such circum-

stances that the receiver of the interest is entitled to the exemption that goes with the receipt of the interest.

The decision of the Board should be affirmed.

Dated, San Francisco,
October 23, 1935.

Respectfully submitted,
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NO. 7740

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United States
Circuit Court of Appeals
For the Ninth Circuit

HARRY THOMPSON, JOHN MARS, and DOUGLAS PARKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Montana.

THE RECORDER PTG. & PUB. CO. 460 FOURTH ST. S. F.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the District of Montana.
(Great Falls Division.)

No. 833.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY THOMPSON, JOHN MARZ, and DOUGLAS PARKER,
Defendants.

BE IT REMEMBERED, that on October 16th, 1931, the complaint was duly filed herein, in the words and figures following, to wit: [2]

[Title of Court and Cause.]

COMPLAINT

Comes now the plaintiff and for cause of action alleges:

1. That on or about the 12th day of May, 1930, a decree was duly entered by the District Court of the United States for the District of Montana, Great Falls Division, in a case then therein pending, being Equity Case No. 1215, entitled United States of America, plaintiff, versus Ted Verberg and Harry Thompson, defendants, wherein it was ordered, adjudged and decreed that the said defendants, Ted Verberg and Harry Thompson, and all other persons be restrained and enjoined from manufacturing, selling, keeping or bartering any

intoxicating liquor as defined in Section I, Title II of the National Prohibition Act, upon the following described premises:

> That certain two-story brick building known as the Thompson Hotel, situated on Lot 3, and 4, Block 2, Original Townsite of Sweet Grass, in the County of Toole, in the State and District of Montana,

and from using said premises as a common and public nuisance as defined in Section 21, Title II, of the National Prohibition Act; and from using or occupying or permitting said premises to be used or occupied for any purpose whatever for a period of one year from the date thereof, or until the further order of said court, which said decree provided, however, that said premises might remain open during said period and might be occupied and used for legitimate purposes if the said defendant Harry Thompson should give a bond in the sum of one thousand dollars ($1,000.00) conditioned as in said decree provided. [3]

2. That, thereafter, and on or about the 31st day of May, 1930, the said Harry Thompson, the defendant above named, as principal, and the defendants John Marz and Douglas Parker, as sureties, in order that said premises might remain open in accordance with the provisions of said decree as aforesaid, duly made, executed and delivered to plaintiff their joint and several bond to the United States of America in the penal and liquidated sum

of $1,000.00. That said bond was duly approved and filed in the above entitled court on the 13th day of June, 1930. That ever since the execution of said bond and during all of the times herein mentioned and to and including the date of the filing of this complaint said bond was and now is, in full force and effect. That the conditions of said bond are, if said premises shall be used and occupied during said period of one year and if no intoxicating liquor is, during said period, manufactured, sold, bartered, kept or otherwise disposed of therein or thereon, and if the said principal and sureties will pay all fines, costs, and damages that may be assessed for any violation of the National Prohibition Act upon said property, then said obligation shall be null and void, otherwise to remain in full force and effect.

3. That said defendants have wholly failed to perform the conditions of said bond in that on or about the 16th day of April, 1931, one Everett Knouse, did, upon said premises hereinbefore described, then and there wilfully, wrongfully and unlawfully have and possess intoxicating liquor, to-wit, beer, whiskey and wine for beverage purposes, and without a permit so to do.

4. That by reason of the premises the said defendants have jointly and severally become and are liable to the plaintiff in the sum of $1,000.00, together with lawful interest thereon from and after the date hereof.

WHEREFORE, plaintiff prays judgment against said defendants for the sum of $1,000.00, with law-

ful interest thereon from the date hereof, together with plaintiff's costs of suit herein expended.

ARTHUR P. ACHER
Assistant United States Attorney. [4]

Arthur P. Acher being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified, and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

ARTHUR P. ACHER.

Subscribed and sworn to before me this 16th day of September, 1931.

[Seal] MARJORIE McLEOD.
Notary Public for the State of Montana,
Residing at Helena, Montana.
My commission expires March 31st, 1934.

[Endorsed]: Filed Oct. 16, 1931. [5]

Thereafter, on October 16, 1931, Summons was duly issued herein, which said Summons with return of service thereof, is in the words and figures following, towit: [6]

[Title of Court and Cause.]

SUMMONS

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Great Falls, County of Cascade. Assigned to Great Falls Division.

The President of the United States of America, Greeting:

To the Above-named Defendant: Harry Thompson, John Marz and Douglas Parker.

YOU ARE HEREBY SUMMONED to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS, the Honorable Charles N. Pray, Judge of the United States District Court, District of Montana, this 16th day of October in the year of our Lord one thousand nine hundred and thirty-one and of our Independence the one hundred and fifty-sixth.

[Seal] C. R. GARLOW
Clerk.
By C. G. KEGEL
Deputy Clerk.

[Endorsed]: Filed Dec. 7, 1931. [7]

District of Mont.,—ss.

I hereby certify and return, that on the 20th day of Oct., 1931. I received the within writ and that after diligent search, I am unable to find the within named defendants Harry Thompson within my district.

TOM BOLTON
United States Marshal.

By CURT DENNIS,
Deputy United States Marshal.

RETURN ON SERVICE OF WRIT

United States of America,
District of Mont.—ss:

I hereby certify and return that I served the annexed writ on the therein-named Douglas Parker by handing to and leaving a true and correct copy thereof with him personally at Sweet Grass in said District on the 21 day of Oct., A. D. 1931.

TOM BOLTON, U. S. Marshal,
By CURT DENNIS, Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Mont.—ss:

I hereby certify and return that I served the annexed writ on the therein-named John Marz by handing to and leaving a true and correct copy

thereof with him personally at Sweet Grass in said District on the 21 day of November., A. D. 1931.

TOM BOLTON, U. S. Marshal,
By CURT DENNIS, Deputy.

[Endorsed]: Filed Dec. 7, 1931. [8]

Thereafter, on November 25, 1931, Demurrer of the defendant John Mars was duly filed herein, in the words and figures following, towit: [9]

[Title of Court and Cause.]

DEMURRER

COMES NOW John Mars, one of the above named defendants, and DEMURS to the Complaint herein on file upon the following ground:

I.

That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

LOUIS P. DONOVAN
Attorney for defendant, John Mars. [10]

State of Montana
County of Toole—ss.

MARGARET POWERS, being first duly sworn on oath deposes and says:

That she is employed in the office of Louis P. Donovan, attorney for defendant, John Mars, in the

above entitled action, at Shelby, Montana; that on the 24th day of November, 1931 she served the foregoing DEMURRER upon Arthur P. Acher, Assistant United States Attorney, by mail, by depositing a true copy thereof in the United States Postoffice at Shelby, Montana, addressed to the said Arthur P. Acher, at Helena, Montana, postage thereon prepaid; that the said Louis P. Donovan resides and has his offices at Shelby, Montana, and that the said Arthur P. Acher resides and has his offices at Helena, Montana, and that there is a regular communication by mail between Shelby, Montana, and Helena, Montana.

MARGARET POWERS

Subscribed and sworn to before me this 24th day of November, A. D., 1931.

[Seal] ETHEL M. MARTIN
Notary Public for the State of Montana
Residing at Shelby, Montana
My commission expires Feb. 24, 1932.

[Endorsed]: Filed Nov. 25, 1931. [11]

Thereafter, on April 13, 1933, court entered an order overruling the demurrer of defendant John Mars, in the words and figures following, towit: [12]

[Title of Court and Cause.]

ORDER OVERRULING DEMURRER

Good cause appearing the within demurrer is hereby overruled within ten days to answer upon receipt of notice hereof.

April 13th, 1933

CHARLES N. PRAY,
Judge.

[Endorsed]: Entered April 13th, 1933. [13]

That on November 10, 1931, Separate Demurrer of Douglas Parker was duly filed herein, in the words and figures following, towit: [14]

[Title of Court and Cause.]

DEMURRER

COMES NOW Douglas Parker, one of the above named defendants, and DEMURS to the Complaint herein on file upon the following ground:

I.

That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

LOUIS P. DONOVAN
Attorney for defendant, Douglas Parker. [15]

State of Montana
County of Toole—ss.

ETHEL M. MARTIN, being first duly sworn on oath deposes and says:

That she is employed in the office of Louis P. Donovan, the attorney for defendant, Douglas Parker, in the above entitled action, at Shelby, Montana; that on the 9th day of November, 1931 she served the foregoing DEMURRER on Arthur P. Acher, Assistant United States Attorney, by mail, by depositing a true copy thereof in the United States Postoffice at Shelby, Montana, addressed to the said Arthur P. Acher, Assistant United States Attorney, at Helena, Montana, postage thereon prepaid; that the said Louis P. Donovan resides and has his offices at Shelby, Montana, and that the said Arthur P. Acher resides and has his offices at Helena, Montana, and that there is a regular communication by mail between Shelby, Montana and Helena, Montana.

ETHEL M. MARTIN

Subscribed and sworn to before me this 9th day of November, A. D. 1931.

[Notarial Seal] LOUIS P. DONOVAN
Notary Public for the State of Montana.
Residing at Shelby, Montana.
My commission expires Aug. 5, 1934.

[Endorsed]: Filed Nov. 10, 1931. [16]

Thereafter, on April 13, 1933, court entered an order overruling the demurrer of defendant Douglas Parker, in the words and figures following, towit: [17]

[Title of Court and Cause.]

ORDER

Good cause appearing the within demurrer is hereby overruled with ten days to answer upon receipt of notice hereof.

April 13th, 1933.

CHARLES N. PRAY,
Judge.

[Endorsed]: Entered April 13th, 1933. [18]

Thereafter, on April 20, 1933, the Answer of defendants John Mars and Douglas Parker was duly filed herein, in the words and figures following, towit: [19]

[Title of Court and Cause.]

ANSWER

COME NOW the defendants, John Mars and Douglas Parker, and for their Answer to the Complaint herein, admit, deny and allege as follows:

I.

ADMIT that on or about the 12th day of May, 1930 a Decree was entered by the District Court of the United States for the District of Montana,

Great Falls Division, in a case therein pending, being Equity Case Number 1215, entitled "United States of America, plaintiff, vs. Ted Verburg and Harry Thompson, defendants"; but defendants DENY that said Decree was in the form set forth in plaintiff's Complaint herein, and ALLEGE that said Decree provided that the defendant, Harry Thompson, might reopen said premises, with the exception of the bar room, for legitimate hotel purposes if he shall pay all costs and give bond with sufficient surety to be approved by the office of the United States Attorney in the penal and liquidated sum of One Thousand Dollars, conditioned that the said premises shall be used for honest and legitimate hotel purposes, and that intoxicating *liquir* would not thereafter be manufactured, sold, bartered, kept or other- [20] wise disposed of in or on said premises, and that said premises would not be used or allowed to be used for or in violation of any of the provisions of the National Prohibition Act, and he would pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises during the period of said bond. A full, true and correct copy of said Decree is hereto attached and marked Exhibit "A" hereof.

II.

These answering defendants further DENY that the said Decree was duly entered, in that at the time of entering said Decree in said suit against said defendants, the Court had no jurisdiction over the

said Harry Thompson, and the Court had not in any manner caused the said Harry Thompson to be served with a Subpoena in said action, or otherwise obtain jurisdiction over him, and the said Harry Thompson had not appeared in said action, nor in any manner submitted himself to the jurisdiction of said court, and the said Decree is null and void as against the said defendant, Harry Thompson. That at the time of the commencement of said suit, and at the time of the entry of said Decree, the said Harry Thompson was the sole owner of the premises described in Plaintiff's Complaint herein, and the said Ted Verburg named in said suit as co-defendant was not at the time of the commencement of said action or the entry of said decree, or at any other time or at all, an owner, lessee or tenant or occupant of said premises, and did not at any time have any right, title or interest in or to said premises, and that by reason thereof the Court was without jurisdiction to cause said decree in said suit to be entered, and said decree is and at all times was null and void.

III.

ADMIT that the defendants, John Mars and Douglas Parker, [21] made, executed and delivered to the plaintiff their joint and several bond to the United States of America in the penal and liquidated sum of One Thousand Dollars, and that said bond was duly approved and filed in the above entitled court on the 13th day of June, 1930, but these defendants DENY that the said Bond was made or

executed by the defendant, Harry Thompson, and these Defendants DENY that the said bond was conditioned as set forth in Paragraph 2 of the Complaint herein, and ALLEGE that the condition of said bond was to the effect that if the said Harry Thompson, his servants, agents, subordinates, employees, successors and assigns, shall well and faithfully adhere to the terms and conditions of the aforesaid decree, and shall use the above described premises for honest and legitimate hotel purposes, and should not thereafter manufacture, sell, barter, keep or otherwise dispose of or permit to be manufactured, sold, bartered, kept or otherwise disposed of intoxicating liquor in or on said premises, and should not use or allow to be used the said premises for or in violation of any of the provisions of the National Prohibition Act, and should pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises for a period of one year from date of said bond, then said bond to be null and void and of no effect; otherwise to remain in full force and virtue. A full, true and correct copy of said bond, justification of sureties omitted, is hereto attached and marked Exhibit "B" hereof.

IV.

These answering defendants DENY the allegations contained in paragraphs 3 and 4 of said Complaint.

V.

Defendants DENY generally each and every al-

legation in plaintiff's Complaint herein contained, not herein specifically [22] admitted.

WHEREFORE, defendants, Douglas Parker and John Mars, pray that plaintiff take nothing by its Complaint herein, and that these answering defendants have judgment for their costs.

LOUIS P. DONOVAN
Attorney for Defendants, John Mars and Douglas Parker.

State of Montana
County of Toole—ss.

DOUGLAS PARKER, being first duly sworn on oath deposes and says:

That he is one of the answering defendants named in the foregoing ANSWER, and makes this verification on his own behalf and for and on the behalf of his co-defendant, John Mars; that he has read the foregoing ANSWER, and knows the contents thereof, and that the same is true except as to the matters therein alleged on information and belief, and that as to those matters he believes it to be true.

DOUGLAS PARKER

SUBSCRIBED AND SWORN to before me this 17 day of April, A. D., 1933.

[Notarial Seal] J. B. SULLIVAN
Notary Public for the State of Montana.
Residing at Sweet Grass, Montana

My commission expires April 15, 1934. [24]

EXHIBIT "A"

District Court of the United States, District of Montana
Great Falls Division

Equity No. 1215

United States of America,

Plaintiff,

vs.

Ted Verburg and Harry Thompson,

Defendants.

DECREE

THIS CAUSE came on regularly to be heard on the 8th day of May 1930, the United States of America being represented by Howard A. Johnson, Assistant United States Attorney for the District of Montana, and the defendants being represented by Molumby, Busha & Greenan, their attorneys, and thereupon, upon proof being submitted, and upon consideration thereof;

The Court found that all the allegations in the Bill in Equity herein are true, and that the premises described in the said bill were, on the date of filing said bill, a common nuisance, and it is now, therefore, hereby

ORDERED, ADJUDGED, AND DECREED that the defendant, Ted Verburg and Harry Thompson, their attorneys, agents, servants, employees, and all persons acting by, through, or under said defendants, and all other persons, be and they are hereby

restrained and enjoined from manufacturing, selling, keeping, or bartering any intoxicating liquor defined in Section 1, Title II, of the National Prohibition Act, upon the following-described premises:

> That certain two-story brick building known as the Thompson Hotel, situated on Lots 3 and 4, Block 2, Original Townsite of Sweet Grass, in the county of Toole, in the state and district of Montana,

and from using said premises as a common and public nuisance as defined in Section 21, Title II, of the National Prohibition Act; and from using or occupying or permitting said premises to be used or [25] occupied for any purpose whatever for a period of one year from the date hereof, or until the further order of this Court;

PROVIDED, however, that the defendant Harry Thompson may reopen said premises, with the exception of the bar room, for legitimate hotel purposes, if he shall pay all costs and give bond with sufficient surety, to be approved by the office of the United States Attorney, in the penal and liquidated sum of One Thousand and no/100 Dollars ($1,000.00), conditioned that said premises shall be used for honest and legitimate hotel purposes, and that intoxicating liquor will not hereafter be manufactured, sold, bartered, kept, or otherwise disposed of in or on said premises, and that said premises will not be used, or allowed to be used, for or in

violation of any of the provisions of the National Prohibition Act, and he will pay all fines, costs, and damages that may be assessed for any violation of the National Prohibition Act upon said premises during the period of said bond; and,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the plaintiff recover from the defendants, Ted Verburg and Harry Thompson, its costs and disbursements herein expended, taxed in the sum of.....Dollars ($.....); all costs incurred, and any and all costs incurring in enforcement hereof for the ensuing year, to be a lien on said premises. WITNESS the Honorable CHARLES N. PRAY, Judge of the above-entitled Court.

Dated this 12 day of May, 1930.

[Seal] C. R. GARLOW,
Clerk of said court. [26]

EXHIBIT "B"

District Court of the United States, District of Montana
Great Falls Division.

Equity No. 1215

United States of America,

Plaintiff,

vs.

Ted Verburg and Harry Thompson,

Defendants.

BOND

KNOW ALL MEN BY THESE PRESENTS:

That WHEREAS, Harry Thompson, one of the defendants above named is the owner of the hereinafter described property and premises and is desirous of continuing to occupy the same for legitimate hotel purposes;

NOW, THEREFORE, the undersigned, JOHN MARS, of Sweet Grass, Montana, and DOUGLAS PARKER, of Sweet Grass, Montana, real estate owners within the State of Montana, as sureties, are held and firmly bound unto the UNITED STATES OF AMERICA in the penal and liquidated sum of One Thousand Dollars ($1,000.00) lawful money of the United States for payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 31st day of May, A. D., 1930.

THE CONDITION of the above obligation is such that that certain two-story brick building known as the Thompson Hotel, situated on Lots Three (3) and Four (4) of Block Two (2) Original Townsite of Sweet Grass, in the County of Toole, in the State and District of Montana, with the exception of the bar room, shall be used for honest and legitimate hotel purposes and that intoxicating liquor will not hereafter be manufactured, sold, bartered, kept or otherwise disposed of in or on said premises, and that said [27] premises will not be used or allowed to be used for or in violation of any of the provisions of the National Prohibition Act, and the undersigned sureties will pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises during a period of one (1) year from date hereof, and that the said Harry Thompson, his servants, agents, subordinates, employees and successors and assigns, shall well and faithfully adhere to all the terms and conditions of that certain Decree of the District Court of the United States, District of Montana, Great Falls Division, in the above entitled action made on the 12th day of May, 1930.

NOW, THEREFORE, if the said Harry Thompson, his servants, agents, subordinates, employees, successors and assigns, shall well and faithfully adhere to all the terms and conditions of the afore-

said decree and shall use the above described premises for honest and legitimate hotel purposes and shall not hereafter manufacture, sell, barter, keep or otherwise dispose of or permit to be manufactured, sood, bartered, kept or otherwise disposed of intoxicating liquor in or on said premises, and shall not use or allow to be used said premises for or in violation of any of the provisions of the National Prohibition Act, and shall pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises for a period of one (1) year from date hereof, then this obligation to be null and void and of no effect, otherwise to remain in full force and virtue.

DOUGLAS PARKER
JOHN MARS

NOTE: (Justification of sureties omitted) [28]
State of Montana

County of Toole—ss.

ETHEL M. MARTIN, being first duly sworn on oath deposes and says:

That she is employed in the office of Louis P. Donovan, attorney for defendants, John Mars and Douglas Parker, at Shelby, Montana; that on the 18th day of April, 1933 she served the foregoing ANSWER of Mars and Parker upon Wellington D. Rankin, United States District Attorney, by mail, by depositing a true copy thereof in the United States Postoffice at Shelby, Montana addressed to

the said Wellington D. Rankin, at Helena, Montana, postage thereon prepaid;

That the said Louis P. Donovan resides and has his offices at Shelby, Montana, and that the said Wellington D. Rankin resides and has his offices at Helena, Montana, and that there is a regular communication by mail between Shelby, Montana, and Helena, Montana.

ETHEL M. MARTIN

Subscribed and sworn to before me this 18th day of April, A. D., 1933.

[Seal] LOUIS P. DONOVAN
Notary Public for the State of Montana
Residing at Shelby, Montana.

My commission expires Aug. 5, 1934.

[Endosed]: Filed April 20, 1933. [29]

Thereafter, on November 2nd, 1934, the Verdict of the Jury was duly rendered and filed herein, being in the words and figures following, towit: [30]

[Title of Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, do find our verdict herein in favor of the plaintiff and against the defendants in the sum of One Thousand Dollars.

G. H. PACKARD
Foreman.

[Endorsed]: Filed Nov. 2, 1934. [31]

Thereafter, on November 3rd, 1934, Judgment was duly entered herein, in the words and figures following, towit: [32]

In the District Court of the United States,
District of Montana
Great Falls Division.

No. 833

UNITED STATES OF AMERICA,
Plaintiff,

v.

HARRY THOMPSON, JOHN MARZ and DOUGLAS PARKER,
Defendants.

JUDGMENT

This cause came on regularly to be heard on this 2nd day of November, 1934 in the above entitled cause before the Honorable Charles N. Pray, Judge of the said court, sitting with a jury of twelve persons duly and regularly impaneled and sworn to try the cause; the plaintiff was represented by James H. Baldwin, United States Attorney and R. Lewis Brown, Assistant United States Attorney, its counsel, and the defendants were present and represented by Louis P. Donovan, their counsel;

Thereupon evidence was introduced by and on behalf of the plaintiff and the plaintiff rested. Thereupon the defendant rested and thereupon and on motion of the plaintiff and by the advice of the

court, the Jury retired to its jury room and returned its verdict in the court for the plaintiff which said verdict is in words and figures as follows, to-wit:

(Title of Court and Cause)

Verdict

"We, the Jury in the above entitled cause, do find our verdict herein in favor of the plaintiff and against the defendants in the sum of One Thousand Dollars

G. H. PACKARD
Foreman."

WHEREFORE, by reason of the law and the evidence and the verdict of the Jury as aforesaid

IT IS ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree that the plaintiff above named, the United States [33] of America, do have and recover of and from the defendants above named, Harry Thompson, John Marz and Douglas Parker, and each of them, the sum of One Thousand ($1000) Dollars, together with interest thereon amounting to $209.97, and the plaintiff's costs herein incurred hereby taxed in the sum of $38.70.

WITNESS the Honorable Charles N. Pray, Judge of the above entitled court this 3rd day of November, 1934.

C. R. GARLOW, Clerk,
By C. G. KEGEL, Deputy. [34]

Thereafter, on November 3, 1934, the Clerk, pursuant to the rule of said court, filed the Judgment Roll in said cause and annexed his certificate thereto in the words and figures following towit: [35]

[Title of Court and Cause.]

United States of America
District of Montana.—ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 3rd day of Nov., 1934.

[Seal] C. R. GARLOW, Clerk,
By C. G. KEGEL, Deputy.

[Endorsed]: Filed November 3rd, 1934. [36]

Thereafter, on December 21, 1934, Bill of Exceptions was duly signed, settled and allowed and filed herein, being in the words and figures following, towit: [37]

[Title of Court and Cause.]

DRAFT OF BILL OF EXCEPTIONS

BE IT REMEMBERED that this cause came on for trial before the Honorable Charles N. Pray sitting with a jury, on the 2nd. day of November,

1934, the plaintiff being represented by J. H. Baldwin, Esquire, and R. Lewis Brown, Esq., and the defendant being represented by Louis P. Donovan, Esquire. Whereupon the following proceedings were had, to-wit:

A jury was impanelled to try the cause and Mr. Brown made a statement of the case for plaintiff.

THE COURT: Do you wish to make a statement now?

MR. DONOVAN: We reserve our statement, your Honor.

MR. BROWN: If the Court please, I offer the Judgment Roll in case number 1215 in Equity, United States, plaintiff, against Ted Verburg and Harry Thompson, defendants. It is in evidence. It is marked filed in this court on the 12th day of May, 1930, and Mr. Donovan has just assured me that he acknowledges these are the original papers, and that prevents calling of the Clerk to identify them.

MR. DONOVAN: We object to their introduction.

THE COURT: Overrule objection.

MR. DONOVAN: I desire to enter an objection here.

THE COURT: All right. Let the jury retire to the hall-way, and remain without the hearing of what transpires here. (Jury [38] leaves court room)

MR. DONOVAN: The defendants object to the introduction of the Judgment Roll, which is offered in evidence, upon the ground, first: that in the said

action this Court did not in any manner acquire any jurisdiction over the defendant, Harry Thompson, and did not serve him with any process of this court by publication, or personal service, or otherwise.

The defendants object to the introduction of any evidence in this case upon the ground the Complaint herein does not state facts sufficient to constitute a cause of action.

2. The defendants object to the sufficiency of the Complaint upon the grounds that it does not allege that the principal named in the bond, or the sureties thereon, have failed to pay any fine, costs or damages assessed for any violation of the National Prohibition Act by reason of unlawful acts committed on said property.

3. The complaint does not allege or show that any intoxicating liquor, during the term of said bond, was manufactured, sold, bartered, kept or otherwise disposed of therein or thereon or thereunder, and thereby the Complaint fails to show any breach of the condition of the bond.

4. That if the Complaint ever stated a cause of action the same was, and is, one to recover a penalty under the National Prohibition Act, and such cause of action failed and ceased to exist on the repeal of the Eighteenth Amendment to the Constitution of the United States in December, 1933.

5. That there is no allegations in the Complaint sufficient to show that the alleged acts of malice was a condition or a renewal of the alleged nuisance which was abated by the judgment of abatement in question and involved in that suit, and therefore,

such act of malice was not a breach of the condition of the bond in question. [39]

THE COURT: Your objection will be overruled. Bring in the jury.

MR. DONOVAN: Note an exception.

MR. BROWN: May this judgment roll be considered as read, and referred to by Counsel at any time they desire during argument, or otherwise, your Honor?

THE COURT: Yes.

Whereupon, the said Judgment Roll in Case No. 1215, in Equity, United States, plaintiff, vs. Ted Verburg and Harry Thompson, defendants, was received in evidence and is in words and figures as follows, to-wit: [40]

District Court of the United States, District of Montana
Great Falls Division

No. 1215

United States of America,

Complainant,

vs.

Ted Verburg and Harry Thompson,

Defendants.

BILL IN EQUITY

To the Honorable, the Judge of the District Court of the United States, for the District of Montana, Sitting in Equity:

The complainant, the United States of America,

brings this its bill of complaint against the above-named defendants and respectfully shows unto this Honorable Court as follows:

1. The complainant, the United States of America, is a corporation sovereign, and this suit is prosecuted in its name and on its behalf by Howard A. Johnson, Assistant United States Attorney for the District of Montana, pursuant to authority thereto granted by Section 22, Title II, of the Act of Congress of October 28, 1919, known as the "National Prohibition Act," and for the purpose of enjoining and abating a certain public and common nuisance as defined in Section 21, Title II, of the said Act of Congress, as now existing upon certain premises situate within the State and District of Montana, more particularly described in that paragraph of this bill marked and numbered "III."

II. This is a suit of a civil nature arising under the Constitution and laws of the United States, and jurisdiction thereof is given to this Honorable Court by Section 22 of Title II of said Act of Congress, and by Section 24 of the Judicial Code of the United States.

III. The complainant is informed and verily believes and therefore alleges on information and belief that the following is a description of the premises (hereinafter referred to as "said premises") upon which said public and common nuisance exists:

> That certain two-story brick building known as the Thompson Hotel, situated on Lot 3, and

4, Block 2, Original Townsite of Sweet Grass, in the County of Toole, in the State and District of Montana. [41]

IV. The complainant is informed and verily believes and therefore alleges on information and belief that the defendant, Harry Thompson, at and during all the times herein mentioned, was and now is the owner of the said premises and that the defendant TED VERBURG is the owner and proprietor of the business conducted on said premises: That the defendant, Ten Verburg, on or about the 7th day of September, 1929, wilfully, wrongfully and unlawfully, did, on said premises, have, keep and possess intoxicating liquor, to-wit, whiskey, gin and beer, in violation of Title II of the National Prohibition Act.

V. The complainant is informed and verily believes and therefore alleges on information and belief that said premises are now used and maintained as a place where intoxicating liquor as defined by Section 1 of Title II of said "National Prohibition Act," is sold and kept for sale for beverage purposes in violation of the provisions of said title by the defendants above named.

VI. The complainant is informed and verily believes and therefore alleges on information and belief that unless restrained and forbidden by the injunction of this Honorable Court, the said defendants will continue in the future to keep, maintain, and use said premises, and assist in maintaining and

using the same as a place where intoxicating liquor is manufactured, sold, kept, or bartered, in violation of Title II of said "National Prohibition Act," and as a common and public nuisance as defined in Section 21 of said title.

VII. Forasmuch, therefore, as your complainant has no remedy in the premises, except in a Court of Equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled by right and equity, and pursuant to the provisions of Section 22 of Title II of said "National Prohibition Act," it respectfully prays that the above-named defendants be directed, full, true, and perfect answer to make to this bill of complaint, but not under oath, answer under oath being hereby expressely waived, and that the said defendants, their agents, servants, subordinates, and employees, and each and every one of them, be enjoined and restrained from using, maintaining, and assisting in using and maintaining said premises as a place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of Title II of said "National Prohibition Act." [42]

The complainant further prays that this Honorable Court shall issue its process directed to the United States Marshal for the District of Montana, commanding him forthwith summarily to abate said public and common nuisance now existing upon said premises and for that purpose to take possession of all liquor, fixtures, or other things now used on said premises in connection with the violation constituting said nuisance, and to remove the same to a

place for safe-keeping to abide the further order of this Court.

The complainant further prays that this Honorable Court shall enter a decree directing that all the intoxicating liquor now on said premises shall be destroyed, or, upon the application of the United States Attorney, shall be delivered to such department or agency of the United States Government as he shall designate, for medicinal, mechanical, or scientific uses, or that the same shall be sold at private sale for such purposes to any person having a permit to purchase liquor, and that the proceeds thereof be converted into the Treasury of the United States as provided in Section 27 of Title II of said "National Prohibition Act."

The complainant further prays that this Honorable Court shall enter a decree directing that no intoxicating liquor as defined in Title II of said "National Prohibition Act," shall be manufactured, sold, bartered, or stored in said premises, or any part thereof, and that said premises shall not be occupied or used for one year after the date of said decree, and in the event that it appears that the owner of said premises had knowledge or reason to believe that the same were occupied or used in violation of the provisions of Section 21 of Title II of said "National Prohibition Act," and suffered the same to be so occupied or used, that this Honorable Court shall enter a decree impressing a lien upon said premises, and directing that the same be sold to pay all costs and fines that may be assessed

or imposed against the person or persons found guilty of maintaining such nuisance.

The complainant further prays that it be granted a restraining order and temporary writ of injunction pending the final hearing and decision of this cause, whereby the said defendants, their agents, servants, subordinates, and employees, and each and every one of them, be enjoined and restrained from conducting or permitting the continu- [43] ance of said public and common nuisance upon the said premises and from removing or in any way interfering with the liquor or fixtures or other things upon said premises and in connection with the violation constituting said nuisance, and that upon final hearing the said injunction be made perpetual.

And complainant prays for such other and further relief as may be meet and just in the premises.

WHEREFORE, the complainant prays that a writ of subpoena issue herein directed to the above-named defendant commanding them on a day certain to appear and answer this bill of complaint.

UNITED STATES OF AMERICA,
Complainant.

UNITED STATES ATTORNEY FOR
THE DISTRICT OF MONTANA.

By HOWARD A. JOHNSON,
Assistant United States Attorney.

United States of America
State of Montana
District of Montana—ss:

Howard A. Johnson, being duly sworn, deposes and says: That he is Assistant United States Attorney for the District of Montana, and is in charge of this action. Deponent has read the foregoing bill of complaint and knows the contents thereof. Deponent is informed and verily believes that each of the allegations therein is true.

The sources of deponent's information and the grounds of his belief are based on an official report made to the United States Attorney relating to the matters and premises averred in the Bill of Complaint by O. K. Nickerson, Acting Federal Prohibition Administrator.

HOWARD A. JOHNSON

Subscribed and sworn to before me this 17 day of Sept. 1929.

[Seal] ARTHUR P. ACHER
Notary Public for the State of Montana,
Residing at Helena, Montana.
My Commission Expires June 30th, 1930.

[Endorsed]: Filed Sept. 18th, 1929. [44]

[Title of Court and Cause—No. 1215.]

SUBPOENA IN EQUITY

United States District Court,
District of Montana

The President of the United States of America
To Ted Verburg, Harry Thompson—Greeting:

YOU ARE HEREBY COMMANDED that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Great Falls, Montana, to answer unto the.....bill of complaint of The United States of America in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

WITNESS the Honorable Charles N. Pray
United States District Judge at Great Falls
this 23rd day of September A. D. 1929.

[Seal] C. R. GARLOW
Clerk.

MEMORANDUM

The Defendant in this case.....required to file.....answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken *pro confesso.*

W. D. Rankin, U. S. Attorney
Helena, Mont.

[Endorsed]: Filed Nov. 4, 1929. [45]

District of Montana, ss.

I hereby certify and return, that on the 25 day of Sept., 1929 I received the within writ and that after diligent search, I am unable to find the within named defendants Harry Thompson within my district.

TOM BOLTON
United States Marshal.

RETURN ON SERVICE OF WRIT

United States of America,
District of Montana.—ss:

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Ted Verburg by handing to and leaving a true and correct copy thereof with him personally at Sweet Grass in said District on the 19th day of October, A. D. 1929.

TOM BOLTON
U. S. Marshal. [46]

[Title of Court and Cause—No. 1215.]

MOTION TO DISMISS

COMES NOW the above named Ted Verburg and MOVES TO DISMISS the Plaintiff's Bill in Equity herein upon the following grounds, to-wit:

1: That the said Bill in Equity does not state facts sufficient to constitute a valid cause in equity.

2: That the action has not been brought by the attorney general, or by any United States attorney, or any prosecuting attorney of any state, or any subdivision thereof, or by the Commissioner or his deputies or assistants.

3: That no service of summons has been obtained upon the owner of the premises sought to be abated, and the Court has not otherwise obtained jurisdiction of said owner.

HENRY McCLERNAN
Attorney for the defendant, Ted Verburg.

[Endorsed]: Filed Nov. 7, 1929. [47]

[Title of Court and Cause—No. 1215.]

ANSWER

COMES NOW the defendant Ted Verburg, and in answer to the allegations contained in the Bill in Equity on file herein, admits, denies and alleges as follows:

-1-

Admits the allegations contained in paragraphs one and two of said Bill in Equity on file herein.

-2-

In answer to the allegations contained in paragraph three of said Bill in Equity, this answering defendant denies each and every allegation in said paragraph contained.

-3-

In answer to the allegations contained in paragraph Four of said Bill in Equity, this answering

defendant admits that Harry Thompson, at all the times mentioned in said Bill in Equity, was the owner of said premises and that Ted Verburg, on or about the 7th day of September, 1929, unlawfully kept and possessed intoxicating liquor, to-wit: whiskey, gin and beer, in violation of Title II of the National Prohibition Act, in one room of said premises and denies each and every other allegation in said paragraph contained.

-4-

In answer to the allegations contained in paragraph Five of said Bill in Equity, this answering defendant denies each and every allegation in said paragraph contained. [48]

-5-

In answer to the allegations contained in paragraph Six of said Bill in Equity, this answering defendant denies each and every allegation in said paragraph contained.

-6-

In answer to the allegations contained in paragraph Seven of said Bill in Equity, the answer under oath having been duly and expressly waived by the complainant in their Bill in Equity, this answering defendant prays that he be dismissed hence and that said Bill in Equity be dismissed and that the complainant take nothing thereby.

Dated this 8th day of May, 1930.

HENRY McCLERNAN
Attorney for defendant, Ted Verburg.

[Endorsed]: Filed May 8th, 1930. [49]

[Title of Court and Cause—No. 1215.]

DECREE

THIS CAUSE came on regularly to be heard on the 8th day of May 1930, the United States of America being represented by Howard A. Johnson, Assistant United States Attorney for the District of Montana, and the defendants being represented by Molumby, Busha & Greenan, their attorneys, and thereupon, upon proof being submitted, and upon consideration thereof;

The Court found that all the allegations in the Bill in Equity herein are true, and that the premises described in the said bill were, on the date of filing said bill, a common nuisance, and it is now, therefore, hereby

ORDERED, ADJUDGED, AND DECREED that the defendant, Ted Verburg and Harry Thompson, their attorneys, agents, servants, employees, and all persons acting by, through, or under said defendants, and all other persons, be and they are hereby restrained and enjoined from manufacturing, selling, keeping, or bartering any intoxicating liquor as defined in Section 1, Title II, of the National Prohibition Act, upon the following-described premises:

> That certain two-story brick building known as the Thompson Hotel, situated on Lots 3 and 4, Block 2, Original Townsite of Sweet Grass, in the county of Toole, in the state and district of Montana,

and from using said premises as a common and public nuisance as defined in Section 21, Title II, of the National Prohibition Act; and from using or occupying or permitting said premises to be used or occupied for any purpose whatever for a period of one year from the date hereof, or until the further order of this Court; [50]

PROVIDED, however, that the defendant Harry Thompson may reopen said premises, with the exception of the bar room, for legitimate hotel purposes, if he shall pay all costs and give bond with sufficient surety, to be approved by the office of the United States Attorney, in the penal and liquidated sum of One Thousand and no/100 Dollars ($1,000.00), conditioned that said premises shall be used for honest and legitimate hotel purposes, and that intoxicating liquor will not hereafter be manufactured, sold, bartered, kept, or otherwise disposed of in or on said premises, and that said premises will not be used, or allowed to be used, for or in violation of any of the provisions of the National Prohibition Act, and he will pay all fines, costs, and damages that may be assessed for any violation of the National Prohibition Act upon said premises during the period of said bond; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendants Ted Verburg and Harry Thompson, its costs and disbursements herein expended, taxed in the sum of.....Dollars ($27.73); all costs incurred, and any and all costs incurring in en-

forcement hereof for the ensuing year, to be a lien on said premises.

WITNESS the Honorable CHARLES N. PRAY, Judge of the above-entitled Court.

Dated this 12th day of May, 1930.

C. R. GARLOW,
Clerk of said court.

[Endorsed]: Filed May 12, 1930. [51]

United States of America,
District of Montana.—ss:

I, C. R. GARLOW, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

WITNESS my hand and seal of said Court this 12th day of May, 1930.

C. R. GARLOW, Clerk,
By C. G. KEGEL, Deputy.

[Endorsed]: Filed May 12, 1930. [52]

MR. BROWN: I now offer in evidence the Writ of Injunction in Cause Number 1215 of this court, and marked filed in this Court on June 12, 1930.

MR. DONOVAN: We object to the document offered in evidence on the ground the Court has no jurisdiction over the defendant, Harry Thompson, or over the sureties, or any parties to this action.

THE COURT: Overrule objection.

MR. DONOVAN: Note an exception.

THEREUPON, said Writ of Injunction in Cause No. 1215 of this Court and marked and filed in this court on June 12, 1930 was received in evidence and is in words and figures as follows, to-wit: [53]

District Court of the United States
District of Montana
Great Falls Division

Equity No. 1215

United States of America,

Plaintiff,

vs.

Ted Verburg and Harry Thompson,

Defendants.

WRIT OF INJUNCTION

To Ted Verburg, and Harry Thompson, their servants, agents, subordinates, employees, and each and every one of them, and all persons acting in aid of, or in connection with them, or any of them, and all other persons whomsoever—Greeting:

WHEREAS, the United States of America, Plaintiff in the above-entitled cause, has filed its Bill in Equity in the District Court of the United States for the District of Montana, and has obtained an allowance of an injunction against the above-named defendant , as prayed for in said bill;

NOW, THEREFORE, WE, having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said Ted Verburg and Harry Thompson, your servants, agents, subordinates, and employees, and each and every one of you, and all other persons, from manufacturing, selling, keeping, or bartering any liquor containing more than one-half of one per cent of alcohol by volume, upon the following-described premises:

> That certain two-story brick building known as the Thompson Hotel, situated on Lots 3 and 4, Block 2, Original Townsite of Sweet Grass, in the county of Toole, in the state and district of Montana,

and from maintaining said premises as a common and public nuisance as defined in Section 21, Title II of the National Prohibition Act; and from using or occupying or permitting said premises to be used or occupied for any purpose whatever for a period of one year from the date hereof, or until the further order of this Court.

Provided, however, that the defendant Harry Thompson may reopen said premises, with the exception of the bar room, for legitimate hotel purposes, if he shall pay all costs and give bond with sufficient surety in the sum of $1,000.00, conditioned as provided in the decree on file herein.

WITNESS, the Honorable Charles N. Pray,

Judge of the United States District Court for the District of Montana, this 12th day of May, 1930.

[Seal] C. R. GARLOW,
Clerk, United States District Court,
District of Montana.

By .....
Deputy.

[Endorsed]: Filed June 12, 1930. [54]

District of Mont.—ss.

I hereby certify and return, that on the 28 day of May, 1930 I received the within writ and that after diligent search, I am unable to find the within named defendants Harry Thompson within my district.

Defend resides at 404 E. Pike St. Seattle Wash.

TOM BOLTON
United States Marshal

By CURT DENNIS
Deputy United States Marshal.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Mont.—ss:

I hereby certify and return that I served the annexed writ on the therein-named Ted Verburg I also posted a copy of the writ on the premises at the same time by handing to and leaving a true

and correct copy thereof with him personally at Sweet Grass in said District on the 29 day of May, A. D. 1930.

TOM BOLTON
U. S. Marshal.
By CURT DENNIS, Deputy.

[Endorsed]: Filed June 12, 1930. [55]

MR. BROWN: I now offer in evidence, if the Court please, the Bond filed in Equity Cause Number 1215 of this court, marked "Approved, June 12, 1930", and marked "Filed June 13, 1930", by the Clerk of the Court.

THE COURT: Same objection Senator?

MR. DONOVAN: May I look at the bond? Same objection.

THE COURT: Same ruling.

MR. BROWN: May we have a like order, your Honor, with reference to the Injunction and Bond, that they be considered read, and referred to by Counsel?

THE COURT: Very well.

THEREUPON, said Bond filed in Equity Cause No. 1215 of this Court, marked "Approved June 12, 1930" and marked "filed June 13, 1930" was received in evidence and is in words and figures as follows, to-wit: [56]

District Court of the United States,
District of Montana,
Great Falls Division

Equity No. 1215

United States of America,

Plaintiff,

vs.

Ted Verburg and Harry Thompson,

Defendants.

BOND

KNOW ALL MEN BY THESE PRESENTS:

That WHEREAS, Harry Thompson, one of the defendants above named is the owner of the hereinafter described property and premises and is desirous of continuing to occupy the same for legitimate hotel purposes;

NOW, THEREFORE, the undersigned, John Mars, of Sweet Grass, Montana, and DOUGLAS PARKER, of Sweet Grass, Montana, real estate owners within the State of Montana, as sureties, are held and firmly bound unto the UNITED STATES OF AMERICA in the penal and liquidated sum of One Thousand Dollars ($1,000.00) lawful money of the United States for payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

IN WITNESS WHEREOF, we have hereunto

set our hands and seals this 31st. day of May, A. D., 1930.

THE CONDITION of the above obligation is such that that certain two-story brick building known as the Thompson Hotel, situated on Lots Three (3) and Four (4) of Block Two (2) Original Townsite of Sweet Grass, in the County of Toole, in the State and District of Montana, with the exception of the bar room, shall be used for honest and legitimate hotel purposes and that intoxicating liquor will not hereafter be manufactured, sold, bartered, kept or otherwise disposed of in or on said premises, and that said premises will not be used or allowed to be used for or in violation of any of the provisions [57] of the National Prohibition Act, and the undersigned sureties will pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises during a period of one (1) year from date hereof, and that the said Harry Thompson, his servants, agents, subordinates, employees and successors and assigns, shall well and faithfully adhere to all the terms and conditions of that certain Decree of the District Court of the United States, District of Montana, Great Falls Division, in the above entitled action made on the 12th day of May, 1930.

NOW, THEREFORE, if the said Harry Thompson, his servants, agents, subordinates, employees, successors and assigns, shall well and faithfully adhere to all the terms and conditions of the afore-

said decree and shall use the above described premises for honest and legitimate hotel purposes and shall not hereafter manufacture, sell, barter, keep or otherwise dispose of or permit to be manufactured, sold, bartered, kept or otherwise disposed of intoxicating liquor in or on said premises, and shall not use or allow to be used said premises for or in violation of any of the provisions of the National Prohibition Act, and shall pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises for a period of one (1) year from date hereof, then this obligation to be null and void and of no effect, otherwise to remain in full force and virtue.

JOHN MARS
DOUGLAS PARKER.

State of Montana
County of Toole—ss.

JOHN MARS, of Sweet Grass, Montana, and DOUGLAS PARKER, of Sweet Grass, Montana, whose names are subscribed as sureties to the foregoing bond, being severally duly sworn, each for himself says:

That he is a resident of and freeholder within the State of Montana, and that he is worth th esum of One Thousand Dollars ($1,000.00) over and above all his just debts and liabilities in property subject to execution and sale, to-wit:

As to the said John Mars the following described property: [58]

West half of Section (7) Seven of Township 36 —Rang 1 west M. M. in Toole County, Montana.

As to the said Douglas Parker, the following described property:

In Section 31, Township 32, Range 1 W.

JOHN MARS
DOUGLAS PARKER

Subscribed and sworn to before me this 31st. day of May, 1930.

[N. Seal] J. B. SULLIVAN
Notary Public for the State of Montana.
Residing at Sweet Grass, Montana.
My commission expires April 15, 1931.

Approved June 12, 1930. Arthur P. Acher, Ass't. U. S. Attorney.

[Endorsed]: Filed June 13—1930. [59]

MR. BROWN: I now offer in evidence the Judgment Roll in the case of United States of America against Everett Knause, and marked, being the original papers of this Court, marked, "Filed May 8, 1931" by the Clerk of this Court.

MR. DONOVAN: To which offer the defendants object on the ground they are irrelevant and immaterial, and the defendants in this action are not parties to said judgment. The same is not in any manner binding on either one of them or against them.

THE COURT: Overrule objection.

MR. DONOVAN: Note an exception.

WHEREUPON, said Judgment Roll in the case of United States of America against Everett Knaus was received in evidence and is in words and figures as follows, to-wit:

District Court of the United States
District of Montana
Great Falls Division

No. 3894

United States of America,

Plaintiff.

vs.

Everett Knouse,

Defendant.

INFORMATION

BE IT REMEMBERED, that Howard A. Johnson, Assistant United States Attorney for the District of Montana, on behalf of the United States, comes into the District Court of the United States for the District of Montana, and informs the Court on this 27th day of April, 1931:

FIRST COUNT
(Possession)

That on or about the 16th day of April, 1931, one Everett Knouse, whose true name is to the informant unknown, at and within those certain premises known as the Thompson Hotel, in the town of Sweet Grass, in the County of Toole, in the State and District of Montana, and within the jurisdiction of this

Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, to wit, whiskey, wine and beer, the exact quantity and character of which are to the informant unknown, intended for use in violation of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America. [61]

That prior to the commission by the said defendant Everett Knouse of the offense set forth and described in manner and form aforesaid, to wit, on the 10th day of May, 1930, the defendant Everett Knouse was, by a judgment duly given and made by the District Court of the United States for the District of Montana, Great Falls Division, in a case then and therein pending, being case No. 2593, entitled United States of America, plaintiff, vs. Everett Knouse and C. J. Quisberg, defendant, convicted of the crime of unlawfully possessing intoxicating liquor in violation of the Act of Congress known as the National Prohibition Act. [62]

SECOND COUNT.
(Nuisance)

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 16th day of April, 1931, one Everett Knouse, whose true name is to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common

nuisance, that is to say, a place where intoxicating liquor was possessed and kept in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

HOWARD A. JOHNSON,
Assistant United States Attorney for
the District of Montana. [63]

HOWARD A. JOHNSON, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified, and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he has read the said information and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

HOWARD A. JOHNSON

Subscribed and sworn to before me this 27th day of April, 1931.

[Seal] MARJORIE McLEOD
Notary Public for the State of Montana,
Residing at Helena, Montana.
My Commission expires March 31st, 1934.

[Endorsed]: Filed April 27, 1931. [64]

[Title of Court and Cause—No. 3894.]

Great Falls, Montana
April 21, 1931

United States of America
District of Montana—ss

AFFIDAVIT

N. E. BAYNHAM, being first duly sworn upon his oath deposes and says, as follows, to-wit:

That he now is and at all times herein mentioned, a duly appointed, qualified and acting Customs Patrol Inspector, and assigned to duty as such in the District of Montana and Idaho;

That upon the 16th day of April, 1931, at about the hour of 8 P. M., he was at and within those certain premises at Sweet Grass, Montana, commonly known as the Thompson Hotel, occupied by one Everett Knaus as proprietor of the said hotel;

That in company with J. E. Libby, James Buckley and James C. Lee, Customs Patrol Inspectors for the District of Montana and Idaho, acting upon authority and permission of Everett Knaus, proprietor of the said hotel, they made a search of his hotel and found, one quart of moonshine whiskey, one quart of wine and three quarts of Fernie Beer, in the basement of the said hotel, the liquor found was retained for evidence, Everett Knaus was ordered to appear before the U. S. Commissioner and

furnish a bond to appear before the U. S. District Court at Great Falls.

N. E. BAYNHAM
Customs Patrol Inspector

Subscribed and sworn to before me this 21st day of April, 1931.

[Seal] CHAS. L. SHERIDAN
Collector of Customs.

[Endorsed]: Filed April 27, 1931. [65]

[Title of Court and Cause—No. 3894]

BENCH WARRANT.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal for the District of Montana,
GREETING:

YOU ARE HEREBY COMMANDED that you apprehend Everett Knouse and him immediately have before the United States District Court for the District of Montana, at Great Falls, Montana, to answer unto an information charging him with violation of the National Prohibition Act, contrary to the form of the Statute in such case made and provided, and against the peace, government, and dignity of the United States. Hereof you are not to

fail at your peril, and have you then and there this writ.

[Seal] WITNESS the Honorable CHARLES N. PRAY, United States District Judge at Great Falls, Montana, this 27th day of April, A. D. 1931.

C. R. GARLOW, Clerk,
By C. G. KEGEL,
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN

District of Mont.—ss.

Received the within writ the 1st day of May, 1931, and executed same on the 2nd day of May 1931 by arresting the within named defendant at Sweet Grass Mont.

$300.00 bond Furnished.

TOM BOLTON
United States Marshal
By CURT DENNIS
Deputy Marshal.

[Endorsed]: Filed May 8, 1931 [66]

[Title of Court and Cause—No. 3894]

JUDGMENT.

Counsel for respective parties, with the defendant, present as before and trial of cause resumed. Thereupon C. J. Nichols, S. W. Simero and C. Hauskin were sworn and examined as witnesses for

defendant, whereupon defendant rested. Thereupon J. Q. Adams and Howard A. Johnson were sworn and testified in rebuttal, and J. E. Libby and James Buckley were recalled and testified in rebuttal, whereupon the evidence closed. Thereupon, after the arguments of counsel, the cause was submitted to the court.

Thereupon, after due consideration, Court finds the defendant guilty as charged, and rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the second offense of unlawfully possessing intoxicating liquor, and the offense of maintaining a common nuisance, in violation of the National Prohibition Act, committed on April 16, 1931, at Sweet Grass, in the State and District of Montana, as charged in the information herein;

It is therefore considered, ordered and adjudged that for said offense you, the said defendant, be confined and imprisoned in the county jail at Great Falls, Montana, for the term of Six Months, which is suspended and defendant placed upon probation for the period of five years, and that you pay a fine of One Hundred Dollars and be confined in said county jail until said fine is paid or you are otherwise discharged according to law.

Judgment rendered and entered May 8th, 1931.

C. R. GARLOW, Clerk,
By H. H. WALKER, Deputy. [67]

United States of America
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this May 8, 1931.

[Seal] C. R. GARLOW, Clerk,
By H. H. WALKER, Deputy.

[Endorsed]: Filed May 8, 1931. [68]

MR. BROWN: If the Court please, we offer in evidence the Judgment Roll in Cause Number 2593, United States of America against Everett Knaus and C. J. Wisberg, and being marked as having been filed in this court on the 10th day of May, 1930.

MR. DONOVAN: I object to this on the ground that it is irrelevant and immaterial to any issue in this case. The defendants herein are not parties to it, and the acts therein charged have no relation to the period that the bond was in force, and the entire Judgment Roll proves no issue in this case.

THE COURT: Overrule Objection.

MR. DONOVAN: Note an exception.

WHEREUPON, said Judgment Roll in the case of United States of America against Everett Knaus

and C. J. Wisberg, was received in evidence and is in words and figures as follows, to-wit: [69]

District Court of the United States
District of Montana
Great Falls Division

No. 2593

United States of America,

Plaintiff,

vs.

Everett Knouse and C. J. Quisberg,

Defendants.

INDICTMENT

In the January, 1930 term of the above-entitled Court, held at the city of Helena, in the State and District of Montana, the Grand Jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the District of Montana and true presentment make of all public offenses against the laws of the United States within the said State and District, upon their oaths and affirmations do find, charge, and present:

FIRST COUNT
(Sale)

That on or about the 20th day of October, 1929, one Everett Knouse and C. J. Quisberg, whose true names are to the Grand Jurors aforesaid unknown, at and within that certain two-story brick building, known as the "Thompson Hotel" and

operated by the defendant Everett Knouse, and located on Lots 3 and 4, Block 2, Sweet Grass Original Townsite, in the County of Toole, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully sell intoxicating liquor, to wit, whiskey, the exact quantity and character of which are to the Grand Jurors aforesaid unknown, without then and there first obtaining a permit from the Secretary of the Treasury, or the Commissioner of Internal Revenue, or the Commissioner of Prohibition, or the Prohibition Administrator for the Nineteenth Prohibition District, so to do; contrary to the form force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [70]

SECOND COUNT
(Possession Liquor)

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 20th day of October, 1929 one Everett Knouse and C. J. Quisberg, whose true names are to the Grand Jurors aforesaid unknown, at and within that certain two-story brick building, known as the "Thompson Hotel" and operated by the defendant Everett Knouse, and located on Lots 3 and 4, Block 2, Sweet Grass Original Townsite, in the County of Toole, in the State and District of Montana, and within the jurisdiction of this

Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, to wit whiskey, beer, gin and Cognac, intended for use in violation of Title II of the National Prohibition Act; contrary to the form, force and effect of the Statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT

(Nuisance)

And the Grand Jurors aforesaid upon their oaths and affirmations aforesaid, do further find, charge, and present:

That on or about the 20th day of October, 1929, one Everett Knouse and C. J. Quisberg, whose true names are to the Grand Jurors aforesaid unknown, at and within that certain two-story brick building, known as the "Thompson Hotel" and operated by the defendant Everett Knouse, and located on Lots 3 and 4, Block 2, Sweet Grass Original Townsite, in the County of Toole, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was sold and kept in violation of Title II of the National Prohibition Act; contrary to the form, force and effect of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

WELLINGTON D. RANKIN
United States Attorney for
the District of Montana. [71]

[Title of Court and Cause—No. 2593.]

INDICTMENT

A true bill,

ADDISON K. LUSK,
Foreman.

Filed in open Court this 7th day of Jan., A. D. 1930. C. R. Garlow, Clerk, By H. L. Allen, Deputy.

Bail, Knouse on $500.00
Bond Quisberg fixed $300.00. [72]

[Title of Court and Cause—No. 2593.]

JUDGMENT.

The United States Attorney with the defendants and their counsel, L. J. Molumby, Esq., present in court.

Thereupon the defendants withdrew their former pleas of not guilty heretofore entered herein, and each defendant entered a plea of guilty as charged and the court rendered its judgment as follows, to wit:

That whereas the said defendants having been duly convicted in this court of unlawfully selling and possessing intoxicating liquor and maintaining a common nuisance in violation of the National Prohibition Act, committed on October 20, 1929 at Sweet Grass, Montana, as charged in the Indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said defendant EVERETT KNOUSE be confined and imprisoned in the

County Jail at Great Falls, Montana, for the term of Sixty Days, and that you pay a fine of One Hundred Twenty-five Dollars, on Counts One and Two of said Indictment; and that on Count three of said Indictment you be confined and imprisoned in the County Jail at Great Falls, Montana, for the term of FOUR MONTHS, which is suspended and defendant placed upon probation for the period of four years.

And it is considered, ordered and adjudged that for said offense you, the said defendant C. J. QUISBERG be confined and imprisoned in the County Jail at Great Falls, Montana, for the term of Thirty Days, and pay a fine of Fifty Dollars, on counts One and Two of said Indictment; and that on Count Three of said Indictment you be confined and imprisoned in the said county jail for the term of NINETY DAYS, which is suspended and defendant placed upon probation for the period of three years.

Thereupon defendant Knouse was granted a stay of commitment to May 16, 1930.

Judgment rendered and entered May 10, 1930.

C. R. GARLOW, Clerk,
By C. G. KEGEL, Deputy. [73]

United States of America
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed

constitute the Judgment Roll in the above-entitled action.

WITNESS my hand and seal of said Court this May 10, 1930.

[Seal] C. R. GARLOW, Clerk,
By C. G. KEGEL, Deputy.

[Endorsed]: Filed May 10—1930 [74]

MR. BROWN: We rest.

MR. DONOVAN: May it please the Court; I would like to make a motion.

THE COURT: Very well. Gentlemen, you may retire to the hall way while we discuss a proposition of law. (Whereupon the Jury left the court room).

MR. DONOVAN: Comes now the defendant, Harry Thompson, and moves the Court for a judgment for non-suit upon the following grounds, and for the following reasons:

1. That the Complaint herein does not state facts sufficient to constitute a cause of action.

2. That the evidence introduced herein does not prove a breach of the continuance of the bond.

3. The evidence introduced herein is wholly insufficient to show that the principal or sureties, named in the bond, failed to pay any or all fines, costs or damages assessed for any violation of the National Prohibition Act upon said property. The evidence is insufficient in that it fails to show there was any act committed on the property which revived the nuisance abated by the judgment in the

abatement suit, or constituted a continuation of that nuisance.

On the further ground, this action is one to recover a penalty under the National Prohibition Act and that the repeal of the National Prohibition Act in December of last year, upon repeal of the Eighteenth Amendment to the Constitution, abated the action and destroyed all right of action, if any theretofore existing.

The defendants, Mars and Parker, move for a judgment of non-suit upon the same grounds specified in the motion for non-suit of Harry Thompson.

THE COURT: The several motions are denied. Call in the jury. [75]

MR. DONOVAN: May it please the Court: At this time I ask an exception to the Court's ruling on each of these motions for a non-suit.

THE COURT: Let the exception be noted.

MR. DONOVAN: Defendants rest.

MR. BALDWIN: We now ask that the jury be directed to return a verdict for the plaintiff, your Honor.

THE COURT: It seems there is nothing else to do, except advise the jury to return a verdict for the plaintiff.

MR. DONOVAN: Note an exception to the ruling of the Court.

THE COURT: Gentlemen of the Jury; At this point it now becomes a matter of law for the Court to advise as to what you are to do in this case. The Court advises you that under the evidence presented here it becomes a matter of law for the Court to

advise you to return a verdict for the Plaintiff. You may retire, or you may sign your verdict there.

MR. DONOVAN: I don't know whether this is in order, to except to this.

THE COURT: Yes, you may take your exception.

MR. DONOVAN: I wish to take an exception to the Court directing a verdict for the Plaintiff.

THE COURT: Yes, you may take an exception.

MR. DONOVAN: Note an exception.

THE COURT: The jury may retire and select a Foreman to sign the verdict in the usual way.

MR. DONOVAN: May we have sixty days in addition to the time allowed by the Rules of Court in which to prepare and serve a Bill of Exceptions?

MR. BALDWIN: No objection, your Honor.

THE COURT: Sixty days in addition to the time allowed by law. [76]

AND NOW, the defendants, within the time allowed by law and the Order of the Court herein, serve and present their draft of Bill of Exceptions herein and ask that the same be settled and allowed by the above entitled court as a Bill of Exceptions herein.

LOUIS P. DONOVAN
Attorney for Defendants.

SERVICE of the foregoing draft of defendants' Bill of Exceptions and receipt of copy thereof acknowledged, this 8 day of December, A. D., 1934.

R. LEWIS BROWN
Asst. U. S. Attorney
Attorneys for Plaintiff. [77]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

THIS IS TO CERTIFY that the foregoing Bill of Exceptions tendered by the defendant, is correct in every particular and is hereby settled and allowed as the bill of exceptions herein, and made a part of the record in this cause, and that said bill of exceptions was lodged with this Court and hereby settled and allowed within the time allowed by law and the Order of this Court, and at the same term.

Dated: December 21st, 1934.

CHARLES N. PRAY
Judge.

Lodged in Clerk's office on Dec. 20—1934

[Endorsed]: Filed Dec 21—1934 [78]

Thereafter, on December 20th, 1934, Petition for Appeal was duly filed herein, in the words and figures following, to wit: [79]

[Title of Court and Cause.]

PETITION FOR APPEAL

COME NOW the defendants, Harry Thompson, John Mars and Douglas Parker, and respectfully petition this Court, and show:

That under date the 3rd day of November, 1933 there was entered in the above entitled court and cause a Judgment in favor of the plaintiff, United States of America, and against the defendants,

Harry Thompson, John Mars (name erroneously spelled "Marz") and Douglas Parker, the said judgment being in the amount of $1,000.00, together with interest thereon amounting to $209.97 and costs; in which said Judgment and proceedings had prior thereto in this cause certain manifest errors were committed to the grievous prejudice of the defendants, and each of them, all of which will more fully appear in detail from the Assignment of Errors filed with this Petition;

WHEREFORE, these defendants, feeling aggrieved by said Judgment, petition and pray this Court for an order allowing said defendants to prosecute an appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided for the correction of errors or the reversal of the judgment erroneously entered; That an order be made fixing the amount of supersedeas bond [80] on appeal as may be required in this case; and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals for its consideration of said cause, and the defendants herewith submit their assignments of error in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court, and your Petitioners will ever pray.

LOUIS P. DONOVAN
Attorney for Defendants.

[Endorsed]: Filed Dec 20—1934 [81]

Thereafter, on December 20th, 1934, Assignment of Errors was duly filed herein, in the words and figures following, to wit: [82]

[Title of Court and Cause.]

ASSIGNMENTS OF ERRORS

The defendants above named in connection with their appeal in this cause, specify the following Assignments of Errors:

(1) That the Court erred in overruling the separate demurrers of the defendants, John Mars and Douglas Parker, to the Complaint in this action;

(2) The court erred in overruling the objection made by defendants at the opening of the trial objecting to the introduction of evidence;

(3) The Court erred in overruling defendants' objection to the introduction in evidence of the Judgment Roll in the case of United States of America against Everett Knaus filed May 8, 1931.

Said Judgment Roll consisted of an Information filed in the trial court April 27, 1931 against one Everett Knaus, and in the first count thereof it was charged that on April 16, 1931, said Everett Knaus "at and within those certain premises known as the Thompson Hotel in the Town of Sweet Grass, ,in the County of Toole and State of Montana * * * * did then and there wrongfully and unlawfully have and possess intoxicating liquor, to-wit: whiskey, wine and beer" (quantity unknown), and that he had been previously convicted. In the second count of said Infor- [83] mation, it was charged that on

the 16th day of April, 1931, said Everett Knaus "at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was possessed and kept in violation of title 2 of the National Prohibition Act", etc. Said Judgment Roll further showed that the parties waived jury trial, and tried said cause to the Court without a jury, and that on May 8, 1931 a Judgment was rendered in said cause by the Court finding said defendant, Everett Knaus, guilty as charged and imposed upon him a penalty of fine and imprisonment.

(4) The Court erred in admitting in evidence the Judgment Roll in Cause No. 2593, United States of America against Everett Knaus and C. J. Quisberg, filed in the trial court May 10, 1930. Said Judgment Roll consisted of an indictment filed in the trial court January 7, 1930 wherein the said Everett Knaus and C. J. Quisberg were charged with the following crimes, to-wit:

FIRST COUNT (Sale): That on or about October 20, 1929 said defendants, Everett Knaus and C. J. Quisberg, "at and within that certain two-story brick building known as the Thompson Hotel and operated by the defendant, Everett Knaus, and located on Lots 3 and 4, Block 2, Sweet Grass Original Townsite in the County of Toole and State and District of Montana * * * * did then and there wrongfully and unlawfully sell intoxicating liquor, to-wit: whiskey", etc.

SECOND COUNT (Possession Liquor): That on or about the 20th day of October, 1929, said defendant, Everett Knaus and C. J. Quisberg, at the same place "did then and there wrongfully and unlawfully have and possess intoxicating liquor, to-wit: whiskey, beer, gin and cognac", etc.

THIRD COUNT (Nuisance): That on or about the 20th day of October, 1929, said defendants, Everett Knaus and C. J. Quisberg, [84] at the same place "did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was sold and kept in violation of Title 2 of the National Prohibition Act", etc.

Said Judgment Roll further showed that on May 10, 1930 said defendants, Knaus and Quisberg, entered pleas of guilty as charged, and on the same day judgment was entered against them finding them guilty and imposing sentences of fine and imprisonment.

(5) The Court erred in denying the Motion of the defendant, Harry Thompson, for a judgment of non-suit.

(6) The Court erred in denying the Motion of the defendants, Mars and Parker, for a judgment of non-suit.

(7) The Court erred in instructing or advising the jury to return a verdict for the plaintiff.

(8) The Court erred in entering a judgment herein for $1,000.00 and interest thereon in the further sum of $209.97 upon a verdict for recovery of

$1,000.00 only without any provision for interest thereon.

(9) The defendant, Harry Thompson, separately assigns as error the decision of the court directing a verdict against him, the said Harry Thompson.

(10) The defendant, Harry Thompson, separately assigns as error the entering of a judgment against him, the said defendant, Harry Thompson.

LOUIS P. DONOVAN
Attorney for defendants
and appellants.

[Endorsed]: Filed Dec. 20—1934 [85]

Thereafter, on December 20th, 1934, Order Allowing Appeal was duly filed and entered herein, in the words and figures following, to wit: [86]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

ON THIS 20th day of December, A. D., 1934, the defendants named in the above entitled cause, by their attorney, having filed herein and presented to this Court their Petition praying that an appeal from the judgment rendered herein be allowed, and having filed an Assignment of Errors intended to be urged by them and praying that a transcript of the records, proceedings and papers upon which said judgment herein was rendered duly authenticated may be presented to the United States Circuit Court of Appeals for the Ninth Circuit, and that a bond

for supersedeas as may be meet in the premises be fixed;

IT IS HEREBY ORDERED that said appeal be and the same hereby is allowed, and the court does hereby fix the amount of said supersedeas bond in the sum of Fifteen Hundred Dollars ($1500.00), which bond when given and approved, shall operate as a supersedeas herein.

DATED this 20th day of December, A. D., 1934.

CHARLES N. PRAY,
JUDGE.

[Endorsed]: Filed Dec 20—1934 [87]

Thereafter, on December 20th, 1934, Citation on Appeal was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [88]

[Title of Court and Cause.]

CITATION ON APPEAL

THE PRESIDENT OF THE UNITED STATES, TO THE UNITED STATES OF AMERICA, GREETING:

YOU ARE HEREBY NOTIFIED that in a certain case in the District Court of the United States, for the District of Montana, wherein United States of America was plaintiff, and Harry Thompson, John Mars and Douglas Parker were defendants, an appeal has been allowed the said defen-

dants to the Circuit Court of Appeals of the United States for the Ninth Circuit—

AND YOU ARE HEREBY CITED and admonished to be and appear in the United Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, County of San Francisco and State of California within thirty (30) days from the date of this Citation to show cause, if any there be, why the judgment appealed from should not be corrected or reversed or a new trial granted and speedy justice done to the said parties in that behalf.

DATED at Great Falls, Montana, this 20th day of December, A. D., 1934.

CHARLES N. PRAY
JUDGE. [89]

DUE PERSONAL SERVICE of the foregoing Citation made and admitted and receipt of copy thereof, together with copy of Petition for Appeal, Assignment of Errors and Order allowing said Appeal, acknowledged this 26th day of December, A. D., 1934

ROY F. ALLAN
Asst. U. S. Atty.,
Attorneys for Plaintiff. [90]

[Endorsed]: Filed Dec 31—1934 [91]

Thereafter, on December 20th, 1934, Bond on Appeal was duly filed herein, in the words and figures following, to wit: [92]

[Title of Court and Cause.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That Harry Thompson, John Mars and Douglas Parker, as principals, and NATIONAL SURETY CORPORATION, a Surety Company duly authorized to act as surety upon bonds in the State of Montana, are held and firmly bound unto UNITED STATES OF AMERICA, the plaintiff above named, in the full and just sum of FIFTEEN HUNDRED DOLLARS ($1500.00) to be paid to United States of America, plaintiff as aforesaid, to which payment well and truly to be made, we bind ourselves and our successors in interest and assigns, jointly and severally by these presents.

DATED at Great Falls, Montana, this 18th day of December, A. D. 1934.

THE CONDITION of this obligation is such that WHEREAS lately at the District Court of the United States, for the District of Montana, in a suit pending in said court between the said plaintiff, United States of America, and Harry Thompson, John Mars and Douglas Parker, the said defendants, a judgment was rendered in favor of the said plaintiff and against the said defendants under date November 3, 1934, and said defendants having thereafter filed a Petition for Appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse and set aside said judgment aforesaid, and for a Citation

directed to the United States of America citing and admonishing the said United [93] States of America to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, County of San Francisco, State of California, as by law provided,

NOW, THEREFORE, if the said defendants shall prosecute said appeal to effect and answer and all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise to remain and be in full force and effect.

HARRY THOMPSON
JOHN MARS
DOUGLAS PARKER

PRINCIPALS

[Seal]

NATIONAL SURETY CORPORATION
By SARAH F. MacHALE
Its Attorney in fact.

SURETY.

THE FOREGOING BOND is hereby approved. DATED this 20th day of December, A. D. 1934.

CHARLES N. PRAY
JUDGE.

[Endorsed]: Filed Dec 20—1934 [94]

Thereafter, on December 20th, 1934, Appellants' Praecipe for Transcript of Record on Appeal was duly filed herein, in the words and figures following, to wit: [95]

[Title of Court and Cause.]

PRAECIPE

TO C. R. GARLOW, ESQ., CLERK OF THE DISTRICT COURT ABOVE NAMED:

You will kindly prepare and certify a transcript of record on appeal from the Judgment rendered and entered in the above entitled cause under date November 3, 1934, and include therein the following papers, to-wit:

1. Judgment Roll in the above entitled cause consisting of:
   (a) The Complaint in said action;
   (b) The Summons, with return of service thereof;
   (c) The separate Demurrers of the defendants, John Mars and Douglas Parker;
   (d) The Order of the court overruling said Demurrers;
   (e) The Answer of the defendants, John Mars and Douglas Parker;
   (f) Verdict of the Jury;
   (g) Judgment herein;
   (h) Your Certificate to the Judgment Roll showing that the foregoing papers constitute the entire Judgment Roll;

2. Bill of Exceptions;
3. Petition for Appeal;
4. Assignment of Errors;
5. Order allowing appeal and fixing amount of bond;
6. Citation on Appeal;
7. Supersedeas Bond.
8. Praecipe for Transcript of Record.

DATED this 20th day of December, A. D., 1934.

LOUIS P. DONOVAN
Attorney for Defendants.

[Endorsed]: Filed Dec 20—1934 [96]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 96 pages, numbered consecutively from 1 to 96, inclusive, is a full, true and correct transcript of the complete record and proceedings in case No. 833, United States vs. Harry Thompson, et al, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript

and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Twenty-seven & 80/100 Dollars, ($27.80), and have been paid by the appellants.

WITNESS my hand and the seal of said court at Great Falls, Montana, this January 10th, A. D. 1935.

[Seal] C. R. GARLOW
Clerk as aforesaid. [97]

[Endorsed]: Transcript of Record. Filed January 14, 1935. Paul P. O'Brien, Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

No. 7740

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRY THOMPSON, JOHN MARS, and DOUGLAS PARKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Montana

LOUIS P. DONOVAN,
Attorney for Appellants,
Shelby, Montana

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRY THOMPSON, JOHN MARS, and DOUGLAS PARKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Montana

LOUIS P. DONOVAN,
Attorney for Appellants,
Shelby, Montana

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRY THOMPSON, JOHN MARS, and DOUGLAS PARKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This action was brought by the United States to recover the penalty specified in a bond given pursuant to the provisions of Section 22, Title 2 of the National Prohibition Act (27 USCA, Sec. 37; R. 2-5). Judgment was entered for the United States against appellants for the amount of the bond and interest thereon (R. 24-25). The appeal is from the judgment so rendered.

The Complaint alleges that on May 12, 1930 Decree was entered in the court below in an equity case therein pending against the defendant, Harry Thompson, and one Ted Verburg, enjoining the maintenance of a liquor nuisance in the Thompson Hotel at Sweet Grass, Montana, and the use or occupation of the said premises for a period of one year thereafter (R. 2-3), but providing, however, that the said prem-

ises might remain open during the said period if the defendant, Harry Thompson, should give a bond in the sum of $1,000.00 conditioned as provided in said decree. It is further alleged that the bond, which is the basis of this suit, was given May 31, 1930 pursuant to said decree (R. 3-4). The condition of the bond and the alleged breach thereof are pleaded as follows:

> "That the conditions of said bond are, if said premises shall be used and occupied during said period of one year and if no intoxicating liquor is, during said period, manufactured, sold, bartered, kept or otherwise disposed of therein or thereon, and if the said principal and sureties will pay all fines, costs, and damages that may be assessed for any violation of the National Prohibition Act upon said property, then said obligation shall be null and void, otherwise to remain in full force and effect.
>
> 3. That said defendants have wholly failed to perform the conditions of said bond in that on or about the 16th day of April, 1931, one Everett Knouse, did, upon said premises hereinbefore described, then and there wilfully, wrongfully and unlawfully have and possess intoxicating liquor, to-wit, beer, whiskey and wine for beverage purposes, and without a permit so to do."
>
> (R. 4.)

The appellants, John Mars and Douglas Parker, filed separate general demurrers to the Complaint (R. 8, 10). These Demurrers were overruled by the trial court (R. 10, 12), and thereafter Mars and Parker answered the Complaint, denying that the bond had been executed by the defendant, Harry Thompson (R. 14-15), and denying that the condition of the bond had been breached (R. 14). The appellant, Harry Thompson, one of the defendants in the court below,

was not served with summons (R. 7) and did not appear or plead in the action.

Upon the trial of the action, before the court sitting with a jury, the defendants objected to the introduction of any evidence on the part of the plaintiff upon the ground of the insufficiency of the Complaint in the following respects:

> "That it does not allege that the principal named in the bond, or the sureties thereon, have failed to pay any fine, costs or damages assessed for any violation of the National Prohibition Act by reason of unlawful acts committed on said property.
>
> 3. The complaint does not allege or show that any intoxicating liquor, during the term of said bond, was manufactured, sold, bartered, kept or otherwise disposed of therein or thereon or thereunder, and thereby the Complaint fails to show any breach of the condition of the bond.
>
> 4. That if the Complaint ever stated a cause of action the same was, and is, one to recover a penalty under the National Prohibition Act, and such cause of action failed and ceased to exist on the repeal of the Eighteenth Amendment to the Constitution of the United States in December, 1933.
>
> 5. That there is no allegations in the Complaint sufficient to show that the alleged acts of *possession* was a *continuance* or a renewal of the alleged nuisance which was abated by the judgment of abatement in question and involved in that suit, and therefore such act of *possession* was not a breach of the condition of the bond in question." (R. 28-29.)

(NOTE: In the record the word "malice" appears instead of the italicised word "possession" and the word "condition" appears instead of the italicised word "continuance". These are typographical errors.)

The objection was overruled by the court and exception taken (R. 29).

Counsel for the Government thereupon introduced in evidence the Judgment Roll in the abatement suit (R. 29-42). This Judgment Roll showed that the defendant, Harry Thompson, was not served with process in that suit (R. 37), and did not appear therein (R. 29-42). The writ of injunction issued in the abatement suit was introduced in evidence (R. 43-45) over the objection of the defendants that the court had no jurisdiction over the defendant, Harry Thompson (R. 42). The bond sued on was introduced in evidence (R. 47-49).

Thereupon counsel for the Government offered and introduced in evidence over the objection of the defendants the Judgment Roll in a criminal action against one Everett Knaus showing that the said Everett Knaus was charged and convicted of a violation of the National Prohibition Act alleged to have been committed on or about the 16th day of April, 1931 "at and within those certain premises known as the Thompson Hotel in the Town of Sweet Grass, in the County of Toole, in the State and District of Montana" (R. 50-57). The defendants objected to the introduction of this Judgment Roll and papers therein contained "on the ground that they are irrelevant and immaterial, and the defendants in this action are not parties to said judgment. The same is not in any manner binding on either one of them or against them" (R. 50). The objection was overruled and exception taken (R. 50). No other evidence of any character was offered in support of the allegation that the condition of the bond had been breached.

Another Judgment Roll was introduced in evidence over the objection of appellants (R. 58), but it related to a transaction occurring prior to the date that the bond herein was given and none of the parties to this suit were parties to that action (R. 59-63).

The Government having rested, the defendant, Harry Thompson, moved for a judgment of non-suit upon the following grounds:

"1. That the Complaint herein does not state facts sufficient to constitute a cause of action.

2. That the evidence introduced herein does not prove a breach of the continuance (condition) of the bond.

3. The evidence introduced herein is wholly insufficient to show that the principal or sureties, named in the bond, failed to pay any or all fines, costs or damages assessed for any violation of the National Prohibition Act upon said property. The evidence is insufficient in that it fails to show there was any act committed on the property which revived the nuisance abated by the judgment in the abatement suit, or constituted a continuation of that nuisance.

On the further ground, this action is one to recover a penalty under the National Prohibition Act and that the repeal of the National Prohibition Act in December of last year, upon repeal of the Eighteenth Amendment to the Constitution, abated the action and destroyed all right of action, if any theretofore existing."

(R. 64-65.)

The defendants, Mars and Parker, moved for a judgment of non-suit upon the grounds specified in the motion for non-suit of Harry Thompson (R. 65). The motions for non-suit were denied and exceptions taken (R. 65). The defendants introduced no evidence

and thereupon the court, on motion of counsel for the Government, directed the jury to return a verdict for the plaintiff (R. 65-66), and defendants excepted thereto (R. 66).

Pursuant to the Court's instruction, the jury returned a verdict "in favor of the plaintiff and against the defendants in the sum of One Thousand Dollars" (R. 23). Judgment was entered thereon for recovery of "the sum of One Thousand ($1000) Dollars, together with interest thereon amounting to $209.97" and costs (R. 25).

Specifications of Error

The defendants make the following Specifications of Error as contained in their Assignments of Error filed in the trial court (R. 69-72).

(1) That the court erred in overruling the separate demurrers of the defendants, John Mars and Douglas Parker, to the Complaint in this action (R. 10-12);

(2) The court erred in overruling the objection made by defendants at the opening of the trial objecting to the introduction of evidence (R. 27-29);

(3) The Court erred in overruling defendants' objection to the introduction in evidence of the Judgment Roll in the case of United States of America against Everett Knaus filed May 8, 1931 (R. 50);

Said Judgment Roll consisted of an Information filed in the trial court April 27, 1931 against one Everett Knaus, and in the first count thereof it was charged that on April 16, 1931, said Everett Knaus "at and within those certain premises known as the Thompson Hotel in the Town of Sweet Grass, in the

County of Toole and State of Montana * * * did then and there wrongfully and unlawfully have and possess intoxicating liquor, to-wit: whiskey, wine and beer" (quantity unknown), and that he had been previously convicted. In the second count of said Information, it was charged that on the 16th day of April, 1931, said Everett Knaus "at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was possessed and kept in violation of title 2 of the National Prohibition Act", etc. Said Judgment Roll further showed that the parties waived jury trial, and tried said cause to the Court without a jury, and that on May 8, 1931 a Judgment was rendered in said cause by the Court finding said defendant, Everett Knaus, guilty as charged and imposed upon him a penalty of fine and imprisonment (R. 51-57);

(4) The Court erred in denying the Motion of the defendant, Harry Thompson, for a judgment of non-suit (R. 64-65);

(5) The Court erred in denying the Motion of the defendants, Mars and Parker, for a judgment of non-suit (R. 65);

(6) The Court erred in instructing or advising the jury to return a verdict for the plaintiff (R. 65-66);

(7) The Court erred in entering a judgment herein for $1,000.00 and interest thereon in the further sum of $209.97 upon a verdict for recovery of $1,000.-

00 only without any provision for interest thereon (R. 23-25);

(8) The defendant, Harry Thompson, separately assigns as error the decision of the court directing a verdict against him, the said Harry Thompson (R. 66);

(9) The defendant, Harry Thompson, separately assigns as error the entering of a judgment against him, the said defendant, Harry Thompson (R. 25).

Questions Involved

The appeal involves the following questions:

(1) Is the allegation of the Complaint to the effect that a third party, one Everett Knaus, possessed intoxicating liquor upon the premises sufficient to show a violation of the condition of the bond?

(2) In order to sustain a right of recovery upon the bond, is it not necessary to allege and prove a failure on the part of the principal in the bond, or someone for whose acts he is responsible, to pay fines, costs or damages assessed for violation of the National Prohibition Act?

(3) If the bond can be deemed to provide a penalty instead of merely assurance for the payment of costs, fines and damages, was not the right of action abated with the repeal of the Eighteenth Amendment to the Constitution?

(4) Does a judgment against a third party (one Everett Knaus in this case) prove a breach of the conditions of the bond as against the defendants herein?

(5) Can the Court, upon a verdict for recovery of $1,000.00, without interest, enter a judgment for

$1,000.00 *and interest in the additional sum of $209.97 more?*

(6) Had the Court jurisdiction to direct a verdict and enter a judgment against the appellant, Harry Thompson, in view of the fact that he had not been served with process nor appeared in the action?

ARGUMENT

I.

IS THE ALLEGATION OF THE COMPLAINT TO THE EFFECT THAT A THIRD PARTY, one Everett Knaus, POSSESSED INTOXICATING LIQUOR UPON THE PREMISES SUFFICIENT TO SHOW A VIOLATION OF THE CONDITION OF THE BOND?

The sufficiency of the Complaint to state a cause of action was raised by Demurrer (Specification [1]), objection to the introduction of evidence (Specification [2]), and motions for non-suit (Specifications [4] and [5]).

The statute which allowed the reopening of the premises notwithstanding the padlocking injunction, read as follows:

> "But the court may in its discretion permit it to be occupied or used if the owner, lessee, tenant or occupant thereof shall give a bond with sufficient surety to be approved by the court making the order, in the penal and liquidated sum of not less than five hundred nor more than one thousand dollars payable to the United States, *and conditioned that intoxicating liquor shall not thereafter be manufactured, sold, bartered, kept or otherwise disposed of therein or thereon,* and that he will pay all fines,

costs and damages that may be assessed for any violation of this chapter upon said property."

27 USCA Sec. 34.

The Complaint does not allege that intoxicating liquor was "manufactured, sold, bartered, kept or otherwise disposed of therein or thereon" (R. 4). It merely alleges "that on or about the 16th day of April, 1931, one Everett Knaus did upon said premises hereinbefore described * * * have and possess intoxicating liquor" (R. 4).

This amounts to nothing more than that a third party—a guest of the hotel or possibly a mere intruder—has entered upon the hotel premises with liquor in his possession. Whether the liquor so possessed by such third party was contained in a flask in his pocket or was concealed in his baggage, or was otherwise possessed by him, is not disclosed in the pleading. But the pleading does not allege a breach of the condition of the bond and therefore fails to state a cause of action, unless it be held that the mere entry of a guest or intruder upon the hotel premises with a flask in his pocket constitutes a breach of the bond for the full penal sum thereof.

The plaintiff is presumed to have stated his case as strongly as the facts will justify.

State v. State Board of Examiners,
74 Mont. 1, 238 Pac. 318;

Alderson v. Republican Courier Co.,
69 Mont. 270, 221 Pac. 544;

Conrad National Bank v. Great Northern R. Co., 24 Mont. 178, 61 Pac. 1.

And when the pleading is susceptible of two mean-

49 CJ 112.

ings, that which is most unfavorable to the pleader must be accepted. This is particularly true where the sufficiency of the pleading is raised by Demurrer.

49 CJ 113.

It will be noted that the statute which prescribes the condition of the bond does not require it to be conditioned that liquor shall not be "possessed" upon the premises (27 USCA Sec. 34). The Complaint does not in any manner purport to show that liquor was "manufactured, sold, bartered * * * or disposed of" upon the premises.

We respectfully submit that an allegation that a third party, wholly unconnected with the premises, did "have and possess intoxicating liquor" upon the premises, is not equivalent to an allegation that liquor was "kept" upon the premises in violation of the condition of the bond.

The word "kept" is the past participle of the word "keep" and, as used in the statute, the present tense of the verb means:

> "to manage, conduct, carry on or attend, as a business; as to keep a store, to keep a hotel".
>
> Funk & Wagnalls New Standard Dictionary.

The word implies some degree of continuity in point of time, and the mere fact that some third party, perhaps a total stranger, was upon the premises and "possessed" liquor, did not show a violation of the condition of the bond. "Kept" and "possessed" are not synonymous terms.

> "The term 'keeping', when used to characterize the keeping of places for the sale of intoxicating liquor in violation of law, 'imports knowledge of the

manner or condition in which it is kept, and a continuing purpose to keep it.' "

Nicholson v. People, 29 Ill. App. 57, 65.

"A fire insurance policy prohibiting the 'keeping and storing' on the premises of articles denominated 'Hazardous' was not violated by such articles being temporarily on the premises, but they must be there for the purpose of being stored or kept before the company could be exempted from liability."

Hynds v. Schenectady Co. Mut. Ins. Co., 11 NY 554, 561.

"The words 'keep and have' in a policy of fire insurance forbidding the insured to 'keep or have' benzine on the premises, were intended to prevent the permanent and habitual storage of the prohibited articles on the premises and the taking of benzine upon the premises for temporary purposes is not prohibited by this clause of the policy."

Mears v. Humbolt Ins. Co., 92 Pac. 15, 19, 37 Am. Rep. 647;

Krug v. German Fire Ins. Co., 23 Atl. 572, (Pa.) 30 Am. St. Rep. 729.

"The word 'kept', as used in an insurance policy providing that it shall be void if certain substances are kept on the premises, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time."

First Congregational Church of Rockland v. Holyoke Mut. Fire Ins. Co., 33 NE 572, 158 Mass. 475, 19 LRA 587, 35 Am. St. Rep. 508.

The presence of five gallons of gasoline upon insured premises

"was not a violation of the clause in the policy insuring the factory that gasoline should not be *kept* or allowed on the premises."

Clute v. Clintonville Mut. Fire Ins. Co., 129 NW 661, 144 Wis. 638, 32 LRA (NS) 240.

Possession on the other hand, may be of an almost momentary character.

> "Possession is actual possession by accused of liquor under his control and domain."
>
> Murphy v. U.S. (CCA Mo.), 18 F. (2d) 509.

Appellants further respectfully urge upon the court the point that the bondsmen are not liable for the act of a third person committed without their knowledge or consent, where such third person is not related to them in any manner as tenant, agent or employee, or otherwise. The contrary construction of the statute would mean that the bondsmen may be subjected to the payment of the full penal sum of the bond without any fault or delinquency on their part, by the unauthorized act of a total stranger—a mere intruder or prospective guest of the hotel entering upon the premises with a liquor flask in his pocket. To avoid such liability, the bondsmen would have to guard the premises and search all persons seeking to enter thereon.

We respectfully submit that the statute does not require or justify such a construction; and that the Complaint herein which merely shows that a third person, an entire stranger to the bondsmen "did have and possess intoxicating liquor" (R. 4) upon the premises, is insufficient to show a breach of the condition of the bond. The Court, therefore, erred in overruling the demurrers to the Complaint, objection to the introduction of evidence and motions for non-suit.

II.

IN ORDER TO SUSTAIN A RIGHT OF RECOVERY UPON THE BOND, IS IT NOT NECESSARY TO ALLEGE AND PROVE A FAILURE

ON THE PART OF THE PRINCIPAL IN THE BOND, OR SOMEONE FOR WHOSE ACTS HE IS RESPONSIBLE, TO PAY FINES, COSTS OR DAMAGES ASSESSED FOR VIOLATION OF THE NATIONAL PROHIBITION ACT?

[Specifications (1), (2), (4), and (5)]

The Complaint is apparently brought upon the theory that the bondsmen are liable for the full penal sum of the bond notwithstanding the fact that there has been no failure "to pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act" (R. 2-3). Appellants respectfully submit that the condition of the bond to the effect "that he will pay all fines, costs and damages that may be assessed for any violation of this chapter upon said property" (27 USCA Sec. 34), is the measure of liability upon the bond. The identical question was decided in 1931 by the District Court of Montana, Bourquin, District Judge, in the case of United States v. Johnson, 51 F. (2d) 312. The following excerpt from the Opinion of Judge Bourquin in that case sets forth the reason for the rule:

> "In principle, the case cannot be distinguished from United States v. Zerbey, 271 US 332, 46 S. Ct. 532, 534, 70 L. Ed. 973. There was a permit to sell intoxicating liquors, and a bond conditioned not to violate the law, and to pay all fines and penalties imposed by law. Payment was a condition, because the valid practice and regulations themselves and law, so provided; and as always, the law is part of the bond. The Supreme Court held that the provision for such payment and not the penal sum was without doubt intended to be and was 'the measure of the obligation incurred under' the bond. Here,

was a permit to occupy the premises for lawful uses, and a bond conditioned as in the Zerbey Case. And the construction and liability in both cases must be one and the same. In brief, a statutory bond to secure performance of two conditions, viz.: (1) Lawful conduct and (2) payment for any breach, the second but a consequential incident of the first, in the nature of things is in legal effect alternative; that is, obey or pay. The failure to perform one imposes no liability, unless there be failure also to perform the other. Until breach of the first condition, there is no debt owed and payment due, and so no possible breach of the second condition. There is no duty to perform the second until the first is breached, and performance of the second is compensation for the breach. Before there can be resort to the bond, there must have been breach of both conditions, happening of both contingencies. And the extent of the liability is not the penal sum prescribed save as a limitation, but is indemnity or payment according to the condition. That is evidently the intent of this more or less crude and confused statute, to arrive at which and to avoid absurdity, requires that the conjunctive 'and' be, as usual, read the alternative 'or'. And that is the principle of Zerbey's Case, supra, even if but vaguely conceived."

United States v. Johnson, 51 F. (2d) 312.

A contrary conclusion was reached by Judge Netterer in United States v. Orth, 59 F. (2d) 774. Therein, Judge Netterer held that the conditions of the bond are several, and that "the penalty in the bond is not to secure material results, but purely a penalty for the affront to the sovereign". (59 F. [2d] 775. In the course of his Opinion, he said:

"No rule of statutory construction, can harmonize the precisely expressed conditions of the bond in issue with indemnity. The expressed intent of the Congress is to prevent traffic in liquors, to close the

building against liquor traffic, which the padlock does, and which the bond assumes under penalty.

The second condition is likewise specific, and in no general way has relation to the first condition by word or phrase. The conditions are not of the same kind. Nor are the conditions capable of an analogous meaning and by association take color from each other, so that the first condition, penalty, is restricted to a sense of the second, indemnity. The second condition has no operative effect in this case."

United States v. Orth, 59 F. (2d) 774.

Appellants respectfully submit that Judge Bourquin's construction of the statute in United States v. Johnson, supra, above quoted, is the correct one, and that it is in harmony with the decision of the Supreme Court in United States v. Zerbey, 271 US 332, 46 S. Ct. 532, 70 L. Ed. 973.

The writer respectfully suggests that the construction which Judge Netterer gives to the statute and bond in U. S. vs. Orth, supra, has the effect of rendering the bond totally inadequate as an assurance for the payment of "fines, costs and damages", and in effect nullifies the provision of the statute providing that the principal and sureties upon the bond shall be liable for the payment of "fines, costs and damages". If the entire penal sum of the bond becomes payable to the Government as a penalty for any violation of the National Prohibition Act occurring upon the premises, then, in such case, there remains no further liability of principal or sureties which may be applied to the payment of "fines, costs and damages that may be assessed for any violation of this chapter upon said property". A construction which would thus nullify

one of the clauses of the statute should be avoided on ordinary rules of statutory constructions.

59 CJ 995.

Attention is also called to the fact that Judge Netterer's opinion in U. S. v. Orth, supra, makes no mention of the earlier decision of Judge Bourquin in U. S. v. Johnson, supra. Apparently the earlier decision of Judge Bourquin in U. S. v. Johnson, 51 F. (2d) 312, was entirely overlooked by Judge Netterer.

III.

IF THE BOND CAN BE DEEMED TO PROVIDE A PENALTY INSTEAD OF MERELY ASSURANCE FOR THE PAYMENT OF COSTS, FINES AND DAMAGES, WAS NOT THE RIGHT OF ACTION ABATED WITH THE REPEAL OF THE EIGHTEENTH AMENDMENT?

[Specifications (2), (4) and (5)].

If we assume for the purpose of argument that Judge Netterer's interpretation of the statute and bond in United States v. Orth, supra, is correct, the Complaint nevertheless fails to state a cause of action. Judge Netterer's conclusion is based upon the view that the statute and bond provide for the recovery of a *penalty* in the event of violation of the National Prohibition Act. He said:

> "The penalty is specific to be paid on doing the prohibited thing against the sovereign will. * * * * The penalty in the bond is not to secure material results, *but purely a penalty for the affront to the sovereign.*"

59 F. (2d) 775.

"Nor are the conditions capable of an analogous meaning and by association take color from each other, *so that the first condition, penalty,* is restricted to a sense of the second, indemnity".

59 F. (2d) 775.

"* * * * The penalty became absolute when the condition was violated."

59 F. (2d) 776.

But if the action is one to recover a penalty for the affront to the sovereign will, as held by Judge Netterer, then the repeal of the Eighteenth Amendment which in effect repealed the National Prohibition Act, operated to abate the action and terminate the proceedings.

It is universally held that the repeal of a statute under which penalties recoverable have been incurred will operate to take away all rights to the recovery of such penalties.

"The repeal of a statute under which penalties recoverable have been incurred will operate to take away all rights to the recovery of such penalties, either by the public or by individuals, unless such rights are preserved by a saving clause or such suits have been prosecuted to judgment before the repealing act takes effect."

59 CJ 1188, Sec. 726, and cases cited.

Continental Oil Co. v. Montana Concrete Co., 207 Pac. 116, 63 Mont. 223.

"On the repeal of the Eighteenth Amendment all laws dependent on this amendment for the congressional power to enact them became inoperative and all actions pending in the trial court or on appeal were properly dismissed."

U. S. v. Chambers, 54 S. Ct. 434, 78 L. Ed.——

Massey v. U. S., 54 S. Ct. 532, 78 L. Ed.——

"The court takes judicial notice of the repeal of the Eighteenth Amendment."

U. S. v. Chambers, supra.

Appellants respectfully submit that if, in accordance with the view of Judge Netterer in U. S. v. Orth, the Complaint can be deemed to have stated a cause of action when the case was filed in October, 1931, and when the Demurrers were overruled, it nevertheless abated upon the repeal of the Eighteenth Amendment and the Court erred in overruling appellants' objection to the introduction of evidence upon the trial of the action and their several motions for non-suit.

If the bond is deemed to provide a *penalty* instead of merely indemnity for the payment of "costs, fines and damages", then the provisions of the bond and the action authorized thereon are merely methods adopted to implement the National Prohibition Act, and all proceedings thereon necessarily abated when the National Prohibition Act became nullified by the repeal of the Eighteenth Amendment December 5, 1933.

A decree cannot be made and entered after repeal of the Eighteenth Amendment which decrees the forfeiture of vessels for carrying intoxicating liquor contrary to the National Prohibition Act.

The Helen (CCA NJ 1934), 72 F. (2d) 772.

Where accused has been convicted of a violation of the National Prohibition Act prior to the repeal of the Eighteenth Amendment, but execution of the sentence was suspended on probation, he was entitled to a discharge where an appeal was pending from the order revoking his probation and reinstating the sen-

tence at the time of the repeal of the National Prohibition Act.

Cornerz v. U. S. (CCA La. 1934), 69 F. (2d) 965.

The repeal of the Eighteenth Amendment also abated the Government's right to recover "a special excise tax of One Thousand Dollars in the case of every person carrying on the business of a brewer, distiller, wholesaler liquor dealer, retail liquor dealer * * * in any state * * * contrary to the laws of such state"; as such provision was in effect a penalty imposed as part of the enforcing machinery of the Eighteenth Amendment and therefore fell with it. And there could be no conviction for violation of that section after repeal of the Eighteenth Amendment.

Constantine v. U. S. (CCA 5th Cir.), No. 7627, Decided March 15, 1935, 2 US Law Week, Index Page 685.

In the case last cited, the court said:

"We think that the language of the Act, in requiring all kinds of handlers of intoxicating liquors to pay the same amount, instead of, as liquor taxing acts do, making the exaction fit the business done, its history from its first introduction on February 24, 1919, after the passage of the wartime Prohibition Act and the adoption of the Eighteenth Amendment, the judicial construction given to this section and the general Revenue Acts, in relation to the National Prohibition Act in general, and Section 35 of that Act, and Section 5 of the Willis-Campbell Act in particular, the administrative interpretation which has followed these decisions, the Act of March 22, 1933, authorizing the manufacture and sale of beer, and, generally, the failure of Congress to reenact this section since the repeal of the Eighteenth Amendment, put beyond question that its function and purpose was to penalize and prohibit; that it was enacted as a penalty, not a

tax, and that it may not now, with the Amendment which authorized it repealed, be enforced as a penalty."

For the same reason, it has also been held that Subdivision (4) of Section 245, Title 26 USCA, imposing a special tax "on all distilled spirits which are diverted to beverage purposes", etc., became inoperative upon repeal of the Eighteenth Amendment.

U. S. v. Glidden Co. (DC Ohio 1934),
8 F. Supp. 177.

In U. S. v. Merrill, et al., (CCA 2d Cir.), 73 F. (2d) 49, the defendants had been charged with smuggling liquor and conspiracy to smuggle. While a majority of the appellate court held that the provisions of the Tariff Act in question were not affected by the repeal of the Eighteenth Amendment and the judgment of conviction was sustained for the reason "that the indictment was not based upon the National Prohibition Act, but upon the Tariff Act of 1930, Sec. 593", the remarks of Judge Hand in his dissenting opinion as to the effect of the repeal upon all legislation intended to implement the Eighteenth Amendment. is pertinent here. We quote the following:

"When the Eighteenth Amendment was repealed, all 'implementing' legislation fell with it, whether it was in the National Prohibition Act or the Tariff Act or anywhere else."

U. S. v. Merrill, et al., 73 F. (2d) 49, at 52.

If the statute under consideration in this case be deemed to impose upon the bondsmen a penalty, as distinguished from a liability for the payment of "fines, costs and damages", then clearly it is purely "implementing" legislation, and necessarily fell with the repeal of the Eighteenth Amendment.

IV.

DOES A JUDGMENT AGAINST A THIRD PARTY (ONE EVERETT KNAUS IN THIS CASE) PROVE A BREACH OF THE CONDITIONS OF THE BOND AS AGAINST THE DEFENDANTS HEREIN?

(Specifications 3, 4 and 5)

The admissibility of evidence in an action at law is to be determined by the State decisions and practice.

Wilcox v. Hunt, 13 Peters 378,
10 L. Ed. 209;

Bucher v. Cheshire Railroad Co., 125 US 555,
8 S. Ct. 974, 31 L. Ed. 795;

Fisher Flouring Mills Co. v. U. S.
(CCA 9th Cir.), 17 F. (2d) 232.

In the case last cited, this Court said:

"Under the conformity statute, a federal court sitting in that state will follow the decisions of the highest court of the state in matters of evidence in common law actions unless Congress has provided otherwise" (citing cases)

Fisher Flouring Mills Co. v. U. S.,
17 F. (2d) 232, at 235;

See also cases collected in Note 84 to Sec.
725, Title 28 USCA.

Knaus was not a party to the bond, nor was he an agent, employee or tenant of any of the parties to the bond. The Montana statute provides:

"The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another."

Sec. 10509 RC Montana 1921.

In this case, there is no "particular relation" between Everett Knaus and the defendants in this suit. The rights or liabilities of the defendants in this action could not, therefore, be "prejudiced" by the act of said Knaus under the terms of the statute above quoted, and the judgment between the United States and Knaus is binding only upon the parties to the action, their representatives and successors in interest.

Secs. 10558, 10559 RC Montana 1921.

The rule applicable to the facts of this case is stated in a general work as follows:

> "Ordinarily a judgment of conviction or acquittal of a party on a criminal charge cannot be used as evidence in a civil action of the facts or matters upon which such judgment is based."

8 Encyc. of Ev. 850-851;

Marceau v. Travellers' Ins. Co., 101 Cal. 338, 35 Pac. 856;

Burke v. Wells Fargo & Co., 34 Cal. 62.

The principle was stated by the Supreme Court of California in Marceau v. Travellers' Insurance Co., supra, and its previous decision in Burke v. Wells Fargo & Co. analyzed. Therein the plaintiff brought suit upon a life insurance policy upon the life of one John D. Fisk, which contained a clause declaring it invalid if death resulted from "intentional injuries inflicted by the insured or any other person". Fisk had been shot to death by one Stillman and Stillman had been tried and convicted of murder and was sentenced to life imprisonment. Upon the trial of the civil action, the insurance company offered in evidence the judgment roll in the case of People v. Stillman. The evidence was excluded and on appeal, the

Supreme Court held the judgment roll properly excluded. The Court said:

> "She was not a party to the action, in no manner interested in the result of the litigation, and her pecuniary interests could in no way be affected by the result of that trial. A striking illustration of this principle is found in Burke v. Wells, Fargo & Co., 34 Cal. 62. One Driscoll was convicted of robbing Wells, Fargo & Co. The parties arresting Driscoll brought an action against that company to recover a reward offered for the arrest and conviction of the thief. It was held by the court that, as against the defendant, Wells, Fargo & Co., that company being a stranger to the action, the record of conviction was no evidence that Driscoll was the thief, and that plaintiff should be required to establish that fact by independent evidence de novo."
>
> Marceau v. Travellers' Ins. Co., 101 Cal. 338, 35 Pac. 756 at 858.

The same rule has been adopted in Montana.

Doyle v. Gore, 15 Mont. 212, 38 Pac. 939.

The following is the headnote taken from Doyle v. Gore, supra:

> "A judgment of conviction for assault before a justice is not admissible, in an action for damages by the person assaulted against defendant, to show the fact of assault."
>
> Doyle v. Gore, 15 Mont. 212, 38 Pac. 939.

In the case of Rodini v. Lytle et al, 17 Mont. 448, 52 LRA 165, 43 Pac. 501, the Supreme Court of Montana held that a judgment against a constable was not even prima facie evidence against the sureties on his bond conditioned for the faithful performance of the duties of his office. In support of its conclusion, the court, speaking through Mr. Justice DeWitt, said:

"It seems that to allow such practice would be an invasion of the principle that every man is entitled to his day in court. Another principle is that, when a defendant is sought to be charged with a liability, there is not a presumption of his liability to commence with. If we hold that a judgment against the principal is conclusive or prima facie evidence against the sureties, the sureties are obliged to start into the action with a presumption of liability against them. The ordinary rule of law is that the plaintiff must prove his case by evidence; but, if a judgment against the principal is evidence against the sureties, the affirmative of the case is thrown upon the defendants. They must take the burden of proof. Instead of the plaintiff proving his case, the defendants are placed in a position of being obliged to prove their non-liability. * * * * * We cannot countenance such practice.

We believe by far the best of the three rules above noticed is that which denies to the judgment against the principal any effect as against the sureties. We think the sureties should not be compelled to face a judgment, with all its presumptions, and one which was rendered in an action to which the sureties were not parties, and of which they had no notice whatever, and to defend which they had no opportunity."

Rodini v. Lytle et al., 17 Mont. 448, at 453-454, 52 LRA 165, 43 Pac. 501, at 503.

If the judgment against the principal upon the bond is not admissible in evidence in an action against the sureties upon the bond, then for much stronger reason a judgment against a total stranger to the bond ought not to be admissible against either principal or sureties upon the bond.

Appellants respectfully submit that the trial court erred in admitting in evidence against appellants herein the Judgment Roll in the case of United States v.

Knaus, and that there is no competent evidence in this case to sustain a judgment for appellee herein, and that the Court erred in denying appellants' motions for non-suit.

V.

CAN THE COURT, UPON A VERDICT FOR RECOVERY OF $1,000.00, WITHOUT INTEREST, enter a judgment for $1,000.00 *and INTEREST IN THE ADDITIONAL SUM OF $209.97 MORE?*

[Specification (7)]

The verdict rendered herein was for $1,000.00 *without* interest (R. 23). The judgment entered by the Clerk adds to the verdict of the jury interest in the sum of $209.97 (R. 25). The Clerk had no authority to enter judgment except "in conformity to the verdict". Section 9403 RC Montana 1921, provides:

> "When trial by jury has been had, judgment must be entered by the clerk, *in conformity to the verdict*, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."
>
> Sec. 9403 RC Montana 1921.

The general rule in the absence of statute is to the same effect and it is held that where the judgment exceeds the verdict by adding thereto interest from a date prior to the verdict, it is erroneous and should be reversed.

> "If plaintiff is entitled to interest on his claim or demand it must be found by the jury and included in their verdict. If the jury do not allow interest in their verdict, the court cannot allow it,

and it is error to give judgment for interest in addition to the amount of the verdict."

33 CJ 1177, Note 1, citing:

American Natl. Bank v. National Wall Paper Co., 77 F. 85, 23 CCA 33;

McNutt v. Los Angeles, 187 Cal. 245, 201 Pac. 592;

Butte Electric Ry. Co. v. Matthews, 34 Mont. 487, 87 Pac. 460.

The rule is stated in a general work as follows:

"There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings."

11 Encyc. of Pl. & Pr. 905.

"A judgment must be rendered for the amount indicated by the verdict. Therefore, where the judgment is entered for an amount greater than the verdict, it is erroneous and will be reversed."

11 Encyc. of Pl. & Pr., 910.

Appellants respectfully submit that the judgment is erroneous in that it exceeds the verdict by the sum of $209.97, and that it should be reversed.

VI.

HAD THE COURT JURISDICTION TO DIRECT A VERDICT AND ENTER A JUDGMENT AGAINST THE APPELLANT, HARRY THOMPSON, IN VIEW OF THE FACT THAT HE HAD NOT BEEN SERVED WITH PROCESS NOR APPEARED IN THE ACTION?

[Specifications (8) and (9)].

The record shows that the defendant, Harry Thompson, was not served with summons in this action (R. 7), nor did he file any pleading or appearance in the action (R. 7-17). The Court was, therefore,

without jurisdiction to direct a verdict against him or to cause a judgment to be entered against him, and the appellant, Thompson, has made a separate assignment of error thereon (R. 72). It appears to the appellants that the trial court's lack of jurisdiction is so obvious that argument is unnecessary.

Appellants respectfully submit that the judgment herein should be reversed and the cause remanded to the trial court with directions to dismiss the action.

Respectfully submitted.

LOUIS P. DONOVAN,
Attorney for Appellants,
Shelby, Montana.

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No. 7740

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE APPELLEE.

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For convenience, we shall reply to the various questions raised, or as appellant's say, questions involved in this appeal, in the same order in which they are argued in the joint brief of the three appellants.

I.

SUFFICIENCY OF THE COMPLAINT

The first question argued in the brief is the sufficiency of the complaint to state a cause of action. It is asserted first that as the complaint alleges that

a third party, one Everett Knaus, had and possessed intoxicating liquor upon the premises, the complaint is not sufficient and, second, because the complaint alleges that the liquor was had and possessed, in place of alleging that it was kept, the complaint is not sufficient.

The Montana statute (Sec. 9129, Revised Codes of Montana, 1921) provides what the complaint must contain, as follows:

1. The title of the action, the name of the court and county in which the action is brought and the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims.

If the recovery of money or damages be demanded, the amount must be stated.

The bond in the action is nothing more or less than a contract, and as applied to contracts, the Supreme Court of Montana, has stated the rule in Borgeas v. Oregon Short Line Railway Company, et al, 73, Mont. 407; 236, Pac. 1069, as follows:

> "The fourth ground of demurrer is the general one that the complaint does not state facts sufficient to constitute a cause of action. It states 'in ordinary and concise language' the facts constituting a contract imposing upon the defendant company a duty, the breach thereof

and resulting damages, both general and special, and therefore states a cause of action."

Considering whether or not the complaint states a cause of action, the complaint itself is taken by its four corners and construction is given to the complaint as a whole and not to any isolated word or words or sentences in it, in determining whether or not it does state a cause of action.

In addition, of course, where the action, as here, is on a bond provided by statute, the statute itself becomes a part of the complaint.

The bond upon which the action was founded was given pursuant to Section 34 of Title 27, U. S. C. A., providing for the abatement of nuisances for injunction or procedure and a bond by the owner and lessee of the building, and that statute provides, where material, as follows:

"It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter, but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall

> give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this chapter upon said property."

The first paragraph of the complaint alleges that on the 12th, day of May, 1935, a decree was entered by the District Court restraining one Verberg and the defendant Thompson and all other persons from manufacturing, keeping or bartering any intoxicating liquor, as defined in Section 1 of Title II of the National Prohibition Act, on the property known as the Thompson Hotel and from using such premises as a common and public nuisance, as defined in Section 21 of Title II of the National Prohibition Act, and from using, occupying or permitting said premises to be used or occupied for any purpose for a period of one year, providing, however, that the premises might remain open during said period and occupied for legitimate purposes if Thompson should give a bond in the sum of $1,000, conditioned as in said decree provided. Paragraph II of the complaint alleges that on the 31st day of May, 1930, the appellant Thompson, as principal, and the other two appellants, as sureties, in order that said premises might remain open in accordance with the provisions

of said decree, as aforesaid, made, executed and delivered to the plaintiff, their joint and several bond in the sum of $1,000 and conditioned in part as set out in the complaint, Paragraph III alleges that the defendants wholly failed to perform the condition of the bond in that on or about the 16th day of April, 1931, one Everett Knaus did, upon said premises, wilfully, wrongfully and unlawfully have and possess intoxicating liquor, to-wit, beer, whiskey and wine for beverage purposes, and without permit so to do. Paragraph IV of the complaint contains the allegations of the amount of damage.

Testing the complaint by the rule laid down by the statute and the decisions of the Supreme Court of the State of Montana, it would seem there could not be any question as to the sufficiency of the complaint to withstand the attack of the general demurrer. The complaint alleges the duty on the part of the defendant by alleging the execution of the bond by the appellants. It sets forth the breach and the resulting damages that the appellee sustained by reason of it.

Appellant's urge, however, that because Knaus was not a party to the bond, or, as they say, a stranger, they are not liable for his having and possessing wilfully, wrongfully and unlawfully, intoxicating liquor for beverage purposes and without a permit, upon the premises. A reading of the complaint discloses that the contention is without merit. Thus the com-

plaint alleges that the decree, pursuant to which the bond was given, not only enjoined Verberg and Thompson, but all other persons from doing the things set out in the decree and in the complaint, but that the place might remain, open, be occupied and used for legitimate purposes if the appellant Thompson should give a bond in the sum of $1,000, conditioned as in said decree provided. To sustain appellant's contention in this respect would be to read into the bond itself, and into the decree of the court, provisions that are not contained in there, namely, that the appellant should give a bond conditioned that the appellants themselves would not do the things enjoined in the decree, but would not be liable if some other person did. The tenor of the bond and the tenor of the obligation the appellants undertook in signing the bond was that the premises should be used for honest and legitimate hotel purposes, that the premises would not be used for the violation of any provision of the National Prohibition laws and that intoxicating liquors would not be manufactured, sold, kept, bartered, or otherwise disposed of on the premises abated. The tenor of the bond is that a certain condition would not arise or certain things would not be done upon the described premises and not that the condition would not be caused or the things done by any particular individual. The purpoes of the bond was to keep liquor out of the described premises, not to keep certain persons from

putting liquor in the described premises, but to keep the described premises, free from liquor placed there by anyone. There is no justification in the pleading that liquor was carried into the place by Knaus in a flask, concealed in his pocket. The complaint alleged that Knaus wilfully, wrongfully and unlawfully did have and possess intoxicating liquor, to-wit: beer, whiskey and wine; these words imply certainly more of a quantity of liquor than could posibly be contained in a flask in a person's pocket. If, as appellants suppose, that Knaus was a guest on the premises, the bond covered the act of the guest in bringing beer, whiskey and wine on to the premises for beverage purposes unlawfully and without a permit so to do. Had the bond not been given and the padlock remained upon the building, of course there would then have been no guests in the hotel and no possibility of any guest bringing beer, whiskey and wine into the premises. If, again, Knaus was a guest or an intruder, or for some particular reason his act would not cause a liability on behalf of the appellants under the bond, the most that could be said in their behalf is that such facts constitute a matter of defense and have nothing to do with stating the cause of action.

It is further contended that the complaint is fatally defective as it does not allege that the whiskey was manufactured, sold, bartered or kept on the premises and assigned to the word "kept," the mean-

ing that it must be kept in the sense of the word of keeping a business for the sale of liquor, and to that end, cite several cases in which the word "kept" has been construed with reference to the keeping of gasoline or like articles on premises insured in alleged violations of the terms of certain insurance policies. The courts there held that the keeping of gasoline or prohibited articles of like nature temporiarly was not a violation of the policy. Those cases are certainly no authority on the question here. The first distinguishing feature is that gasoline was not prohibited and contraband article that one was not permitted to possess. The intoxicating liquor that was had in this hotel was at that time a prohibited and contraband article that Knaus had no authority or right to have or possess in the hotel or any place else. Sec. 12, Title 27, U. S. C. Munn v. U. S., Circuit Court of Appeals Ninth Circuit, 4 F. (2d) 380. Keen v. U. S., Circuit Court of Appeals, Eighth Circuit, 11 F. (2d) 260.

It certainly cannot be contended that it would not be a violation of the statute or the decree of the court and of the bond for the appellants to temporarily have or possess intoxicating liquors upon these premises.

Again, the word "kept" does not have the restricted meaning contended for by the appellants as the same is used in this statute. Thus, the statute says that in entering the decree of abatement, "the

Court shall order that no liquor shall be manufactured, sold, bartered, or stored in such * * * house * * *; and that intoxicating liquors shall not be manufactured, sold, bartered, kept or otherwise disposed of." If the word "kept" is to be given the meaning contended for by appellants, i. e., keeping for sale as a business, the word means nothing more than the word sold or bartered as already used in the statute. By alleging in the complaint that Knaus did wilfully, wrongfully and unlawfully have and possess intoxicating liquors for beverage purposes and without a permit so to do, the pleader certainly alleged a breach of the bond and certainly alleged that he kept the liquor on the premises. It is obvious that he could not have it there and possess it there without keeping it there and whether it was kept there or had and possessed there temporarily or permanently it was equally a breach of the bond to have it and keep it there for any period of time whatsoever.

Again, the statute provides that the liquor shall not be otherwise disposed of and in having and possessing the liquor on the premies, the liquor was then otherwise disposed of within the meaning and intent of the statute, the decree of the Court and the bond given to reopen the premises. We do not believe that it can be seriously contended that it was lawful to have and possess this liquor on these premises at the time they were had and possessed temporarily or for any other period of time. The authorities cited

above hold that it was not. Neither do we believe that it can be seriously contended that being unlawful, the decree of abatement of the premises did not abate it for the purposes of having and possessing the liquor in the premises, as well as for the other purposes set out in the decree or that, to adopt appellant's assertion, the bond simply insured against the manufacture, sale or barter of the liquor and did not insure against the having and possessing of the liquor upon the premises abated and reopened under the bond.

If, as appellant's assert, to prevent liability upon themselves, they would have to guard the premises and search all persons seeking to enter thereon, the answer is that they voluntarily assumed the liability and cannot evade it by asserting that it would be highly burdensome to them to insure that the bond would not be breached and an ensuing liability imposed upon them.

We submit that the complaint states a cause of action and the assignment of error in that respect is without merit.

II.

THE MEASURE OF THE RECOVERY UNDER THE BOND.

Appellants contend that the full measure of recovery under the bond is the amount of fines, costs and damages, if any, assessed for a violation of the

National Prohibition Act. Appellants predicate this argument upon the fact that the bond contains the following language:

> "To pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act."

In making this argument appellants must, of necessity, overlook other more important conditions of the bond than that they quote. It would seem to go without saying that the function of the padlock and the function of the bond, that takes the place of the padlock, was primarily to insure that the nuisance for which the property was abated would not continue, and that the law would not be violated. To accept appellant's contention would place the United States in the position of permitting one to continue the nuisance and violate the law upon condition that a bond be posted that the fines and costs imposed for the subsequent violation of the law would be paid, this in the face of the fact that the United States has ample provisions for collecting fines and costs imposed in criminal actions, through commitments to jail and through the execution and sale of property if a defendant has the property. The bond appears in the record at pages 47, 48 and 49. Its conditions are as follows:

> "THE CONDITION of the above obligation is such that that certain two-story brick building known as the Thompson Hotel, situated on Lots Three (3) and Four (4) of Block Two (2) Orig-

inal Townsite of Sweet Grass, in the County of Toole, in the State and District of Montana, with the exception of the bar room, shall be used for honest and legitimate hotel purposes and that intoxicating liquor will not hereafter be manufactured, sold, bartered, kept or otherwise disposed of in or on said premises, and that said premises will not be used or allowed to be used for or in violation of any of the provisions (57) of the National Prohibition Act and the undersigned sureties will pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon said premises during a period of one (1) year from date hereof, and that the said Harry Thompson, his servants, agents, subordinates, employees and successors and assigns, shall well and faithfully adhere to all the terms and conditions of that certain Decree of the District Court of the United States, District of Montana, Great Falls Division, in the above entitled action made on the 12th day of May, 1930.

"NOW, THEREFORE, if the said Harry Thompson, his servants, agents, subordinates, employees, successors and assigns, shall well and faithfully adhere to all the terms and conditions of the aforesaid decree and shall use the above described premises for honest and legitimate hotel purposes and shall not hereafter manufacture, sell, barter, keep or otherwise dispose of or permit to be manufactured, sold, bartered, kept or otherwise disposed of intoxicating liquor in or on said premises, and shall not use or allow to be used said premises for or in violation of any of the provisions of the National Prohibition Act, and shall pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act upon

> said premises for a period of one (1) year from date hereof, then this obligation to be null and void and of no effect, otherwise to remain in full force and virtue."

Its first condition is that Thompson will adhere to all the terms and conditions of the decree. One of the conditions of the decree was that all persons be restrained and enjoined from * * * keeping * * * intoxicating liquor upon the premises; another condition of the decree is that the premises shall be used for honest and legitimate hotel purposes; another condition of the bond is that they shall not use or allow to be used said premises for or in any violation of the provisions of the National Prohibition Act. It will thus be seen that while the bond is conditioned for numerous things, appellants' argument, if correct, wipes out all of the numerous conditions that are contained in the bond, makes them as though they were never expressed therein and observes only one of the many conditions, and that is to pay all fines, costs and damages that may be assessed. If appellants' contention is correct, then it necessarily follows that there could be no recovery under the bond unless there were first a prosecution and a conviction. Thus, if the officers had gone into this building and had seen a still in full operation, but were unable to apprehend the owner of the still, there could be no recovery under the bond because they had not been able to apprehend the man operating the still. Again, if the officers had gone

into the property and found a bar completely equipped and liquor being sold, and the operator of the bar had been indicted, but had died prior to his trial, there could be no recovery under the bond, as there would have been no conviction and thus necessarily no fines or costs assessed.

Judge Neterer, in U. S. v. Orth, et al, 59 F. (2d) 774, in denying a like contention, said:

> "Neither nuisance nor forfeiture is dependent on prior conviction on criminal charge; the penal bond removes the padlock and opens the building, but is conditioned effective to keep the whiskey out. This condition is several, and is complete, and seals the building by legal fiction as effectively against keeping intoxicating liquor, etc. therein as did the padlock. The penalty is specific to be paid on doing the prohibited thing against the sovereign will."

Again, in the same case, at Page 776:

> "The penalty became absolute when the condition was violated. Conviction for the act was not necessary, no fine or costs a pre-requisite. The fact that there was a conviction and fine is immaterial as to forfeiture. Whether the payment of the fines and costs, etc. may be claimed as part payment of the penalty of the bond, when the issue is properly raised and effect given to both conditions, is not before the Court, is not considered, and as to which opinion is withheld."

The bond in the case of U. S. v. Amsterdam Casualty Company, 45 F. (2d) 93, was one given on be-

half of the British Schooner Dorin, towed into an American port in distress with a cargo of liquor aboard. As here, a federal statutory bond for a fixed amount was given to the Government. Concerning the subject before the Court here, the Circuit Court of Appeals for the First Circuit said:

> "As pointed out in that opinion, the bond in question is a federal statutory bond for a fixed amount—one given to secure the government for the exact amount of estimated duties on the Dorin's cargo. It would seem, therefore, that it is a penalty or forfeiture bond. If it is and it having been found that it is the defendant's bond and that the condition has been broken, judgment would be for the full amount of the bond; which would not be subject to being chancered. Clark v. Barnard, 108 U. S. 436, 455, 457, 2 S. Ct. 878, 27 L. Ed. 780; United States v. Dieckerhoff, 202 U. S. 302, 26 S. Ct. 604, 50 L. Ed. 1041; United States v. Montell, 26 Fed. Cas. page 1293, No. 15,798; Eagle Indemnity Co. v. United States (C. C. A.) 22 F. (2d) 388; Illinois Surety Co. v. United States (C. C. A.) 229 F. 527."

In Eagle Indemnity Company v. U. S., 22 F (2d) 388, the bond in that instance was given by a ship carrying liquor, towed into a port of the United States in distress, conditioned, among other things, to pay certain charges, and other conditions being forfeiture as in the bond at bar. The Circuit Court of Appeals for the Fourth Circuit held that the bond was severable and part of it being indemnifying and part a forfeiture, the bond can be enforced as to the

conditions of the forfeiture. The Circuit Court of Appeals further said, at Page 391:

> "The Government undoubtedly had in view the prevention of the violation of its laws prohibiting the importation of alcohol or alcoholic liquors. It is unreasonable to presume that, after allowing the Murray the freedom of its waters and harbors, while laden with a prohibited and contraband cargo, she would be allowed to go upon the security of a bond that would require the United States to keep the vessel under surveillance until it had discharged its cargo, a course impossible of being pursued."

It is like the situation here. It is unreasonable to presume that after the Court had found a nuisance existing on this property and the Court had abated the same and padlocked the building, that it would allow the building to be re-opened upon the security of a bond to pay only costs and fines upon the further continuation of the nuisance and thus require the officers of the Government to keep the building under surveillance at all times, to see whether or not the nuisance was being continued and arrest the perpetrator of it, if it were.

The Circuit Court further said, at Page 392:

> "As to where the Murray went or what she did with her cargo, would of necessity be known only to the master and crew of the vessel, and it is not reasonable to presume that the United States Government would enter into such an undertaking, solely upon the security of an indemnifying bond requiring proof of specific

> damages. The Government had the right to take every precaution possible against the violation of its laws, and against its being defrauded of its custom duty. The measure of damages to the Government for the violation of its laws, if any, could not be estimated in dollars and cents. The damage for the failure to present the landing certificate is not computable."

So here, as to what Thompson did with his property would, of necessity, be known only to himself. The Government not only had the right to take every precaution to insure that its laws would not again be violated on this property, but it did so when it padlocked the property, and when the appellants removed the padlock and substituted the bond upon the conditions imposed by the statute, that if its laws would be violated they forfeited One Thousand Dollars, the appellants then at their peril, to save themselves from the forfeiture, should have insured that the laws be not violated on the premises.

The Circuit Court further says, at page 393:

> "Then as to the amount of the damages. This bond is not given in contemplation of an inquiry of a matter of dollars and cents. How much damage is done to this country by the importing into this country of a gallon of intoxicating liquor, there is no possible way of estimating, no way of reducing it to dollars and cents. The obligation of the bond is an absolute one to compel the strict performance of the contract and agreement, and when the contract and agreement is violated, then the whole of the bond becomes absolute."

So here, although appellants say that the bond is conditioned to pay the damages, there is likewise no way of determining the damage or reducing the damage to dollars and cents for the having and possessing upon this property of beer, whiskey and wine for beverage purposes and without a permit so to do, and for the violation of the laws of the United States on the premises. There is no other measure of damage fixed than that the parties agreed that the measure of damage insofar as appellants were concerned would be the full face of the bond. It is further said by the Circuit Court:

> "The obligation of the bond is absolute and the violation of the agreement, set out in the bond, completes the forfeiture, without any obligation upon the Government to prove specific damage."

Reliance is placed upon the decision of Judge Bourquin in U. S. v. Johnson, 51 F. (2d) 312.

If Judge Bourquin's decision is to the effect that the bond simply insures against costs, fines and damages and the other provisions of the bond are to be ignored his decision is contrary to the weight of authority and based upon a misconception of the holding of the Supreme Court of the United States in U. S. v. Zerby, 271 U. S. 332. The Zerby case is discussed at length by the Circuit Court of Appeals for the Fourth Circuit in Eagle Indemnity Company v. U. S., 22 F (2d) 388, and it is there clearly pointed

out that the bonds considered by the Supreme Court were entirely different from the character of bonds considered by the Circuit Court of Appeals in the Eagle Indemnity case and the bond before the Court here.

There is no rule of construction cited by appellants that would permit the Court to disregard all of the other conditions in the bond, as it would be required to do to sustain appellants' contention and we have been unable to find any. We believe the contention made in this respect by appellants to be without merit.

III.

EFFECT OF THE REPEAL OF THE EIGHTEENTH AMENDMENT.

Relying upon the decision of the Supreme Court of the United States, in U. S. v. Chambers, 291, U. S. 217, and United States v. Massey, 291 U. S. 608, 655, 699, appellants contend that the repeal of the Eighteenth Amendment relieves them of the contract obligation they assumed upon signing the bond.

It will be noted here that at the time the statutory bond was given, the Eighteenth Amendment was in effect and the acts of Congress pursuant thereto were all in effect and had not been repealed. Likewise the judgment of abatement was a final judgment. The building would have remained padlocked for the entire year and thus the enforcement of the

decree would have been completed before the repeal of the Eighteenth Amendment.

Upon the breach of the agreement and the bond, the right of the Government to the payment of the money became absolute and the duty of the appellants to pay became absolute. In suing upon the bond, the Government brought its ordinary action at law to collect an obligation due to the United States. It was not dependent in any respect upon any statute enacted by Congress by virtue of the Eighteenth Amendment, in bringing the action, no more so than if the bond had been given to insure the due performance of the lessees of a coal mining lease and the obligation there had been broken.

The decision of the Supreme Court in the Chambers case and in the Massey case were both in cases in which the Supreme Court was considering criminal cases and criminal law. It was obvious in those cases, as pointed out by the Supreme Court that a sentence cannot be imposed upon the defendant there after the repeal of the Eighteenth Amendment, because of the fact that the statute providing for the sentencing of the defendant, the amount of the fines, the length of the jail term had been repealed and fell with the Eighteenth Amendment. However, here, there is no statute providing for the bringing of this action or the recovery of the amount due that the Government is proceding under that depended

for its life upon the Eighteenth Amendment. In Coombes v. Getz, 285 U. S., 434, in considering a like question, the Supreme Court said at page 443:

> "The necessary effect of the repealing act, as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

We believe that the Supreme Court settled this question adversely to appellants' contention when on May 20, 1935, it decided the case of United States of America v. James A. Mack, et al,.....U. S. ..... (The case has not been officially reported and the citation will be given at the oral argument.) That was a case in which the American motor boat Wanda had on board a cargo of intoxicating liquors; the vessel was seized and the crew arrested for an offense against the National Prohibition Act. Thereupon Mack claimed to be the owner of the vessel and gave a bond as principal in the sum of $2,200, conditioned the bond should be void if the vessel was returned to the custody of the Col-

lector on the day of the criminal trial to abide the judgment of the Court. The members of the crew were brought to trial January 26, 1931, and were sentenced on a plea of guilty. The vessel was not returned by the owner at any time to the custody of the Collector. The United States filed its complaint July 19, 1933, against the principal and surety for the value of the vessel, with interest. A motion to dismiss the complaint was made in April, 1934, defendants contending that liability on the bond ended with the repeal of the Eighteenth Amendment. The motion was granted by the District Court and the Circuit Court of Appeals for the Second Circuit affirmed the action of the trial court, 73 Fed. (2d) 265. In reversing the Circuit Court of Appeals and holding that the repeal of the Eighteenth Amendment had no effect upon the Government's action to recover under the bond, the Supreme Court said:

> "Penalties and forfeitures imposed by the National Prohibition Act for offenses committed within the territorial limits of a state fell with the adoption of the Twenty-first Amendment. United States v. Chambers, 291 U. S. 217. Our holding to that effect was confined to criminal liabilities, and had its genesis in an ancient rule. On the other hand, contractual liabilities connected with the Act continued to be enforcible with undiminished obligation, unless conditioned by their tenor, either expressly or otherwise upon forfeitures or penalties frustrated by the Amendment. The Courts below have held that liability upon the bond in suit was condi-

tioned by implication upon the possibility in law of subjecting the delinquent vessel to forfeiture and sale, and that the possibility must be unbroken down to the recovery of judgment against the delinquent obligors. In opposition to that holding the Government contends that the bond is a contract to be enforced according to its terms; that liability became complete upon the breach of the express condition for the return of the delinquent vessel; and that the liability thus perfected was not extinguished or diminished by the loss of penal sanctions. We think the Government is right."

IV.

ADMISSIBILITY OF THE EVIDENCE.

In support of its case, the United States offered in evidence (R. p. 50), the judgment roll in the case of U. S. v. Everett Knaus, charged in the information with possessing liquor at the Thompson Hotel on the 16th day of April, 1931, and with maintaining a common nuisance within said premises on the said day, and the judgment of the Court (R. p. 56) finding the defendant guilty as charged and fixing his punishment. Appellants contend that this evidence was incompetent and inadmissible and not sufficient to make a prima facie case against the appellants. Appellants argue that Knaus was not a party to the bond nor was he an agent, employee or tenant of any of the parties to the bond. It is true that Knaus was not a party to the bond in the sense of being one of the signors thereon, however, it is equally true

that the giving of the bond by the appellants protected the Government against the act of Knaus in having the liquor upon the premises abated and in maintaining a common nuisance thereon. In this connection it might be interesting to note that prior to this time Knaus had been indicted for selling and possessing liquor in October of 1929 upon the same premises and for maintaining a common nuisance upon the same premises. (R. p. 59). The condition of the bond was absolute that the building abated would thereafter not be used in violation of the National Prohibition Act and the sureties unconditionally obligated themselves that it would not be. (R. p. 48.)

The bond insured the continuing status of the property as remaining lawful, the object to be accomplished by it being that the property itself would not be used in violation of the National Prohibition Act. The judgment against Knaus in the criminal case determined in that case the fact that the property had not been used for lawful purposes, but had been used for unlawful purposes in violation of the law, and the nuisance enjoined against continued. It was that, of course, that created the status or the condition.

There is a diversity of judicial opinion as to the admission in evidence of judgment rolls in criminal cases upon the trial of a civil action. There is not a

great deal of diversity of opinion on the question as to whether they are admissible, the diversity of opinion being largely upon the effect to be given the judgment roll after its admission, some courts holding that the judgment roll is conclusive on the trial of the civil cause, other courts holding that the judgment roll is only prima facie evidence that may be rebutted or overcome by the defendant in the civil suit. That point is not of importance here, for as far as this case is concerned, it makes no difference whether the Court holds that it is conclusive or only raises a prima facie case as the defendants rested with the plaintiff and introduced no evidence whatsoever in their behalf.

Thus, in the case of Eagle Star and British Dominion Insurance Company v. Kellar, 149 Va. 82, 140 S. E. 314, the Virginia Court says:

> "To permit a recovery under a policy of fire insurance by one who has been convicted of burning the property insured, would be to disregard the contract, be illogical, would discredit the administration of justice, defy public policy and shock the most unenlightened conscience."

The Virginia Court thus held the judgment conclusive. On the other hand, the Court of Appeals of the State of New York, in Rose Schindler, Respondent, v. Royal Insurance Company, 179 N. E. 711, says:

> "It would be an unedifying spectacle if the Courts should now apply the strict rule which

> excluded all reference to the judgment of conviction in the civil action as evidence tending to establish the material facts. We shall, however, continue to hold that it is not effective as a plea in bar."

The New York Court thus holding that the judgment in the criminal action is not conclusive but is prima facie evidence of the facts set out. To the same effect, see Sovereign Camp W. O. W. v. Gunn, (Ala) 150 So. 491.

The Supreme Court of the United States has settled the question against the contention of the appellants in the case of Moses, et al, v. United States, 166 U. S. 571. In that action an officer of the Water Department was bonded, after his resignation from the service he was found to be short to a large extent in his accounts. The United States sued him and obtained a judgment against him and then brought an action against the sureties to recover under his bond and upon the trial of the case, introduced the judgment roll in the case of United States v. the Officer Howgate. The sureties urged error in that respect, and in denying the contention, the Supreme Court said (at p. 600):

> "One other objection was taken upon the trial, and that was to the admission of the judgment recovered against Howgate by the Government.
>
> "Neither surety was a party to that judgment, which was solely against Howgate, and the record in that case was admitted in evidence under

the objection and the exception of the defendants. We are of opinion that the judgment was properly admitted in evidence against the surety. It proved, at least, prima facie, a breach of the bond by showing the amount of public monies which Howgate, the principal, had failed to faithfully expend and honestly account for. It was far beyond the penalty in the bond, and, unexplained, the judgment was sufficient evidence of the breach of the condition. Drummond v. Prestman, 25 U. S. 12, Wheat, 515. U. S. v. Burbank, 71 U. S. 4, Wall, 186, McLaughlin v. Bank of Potomac, 48 U. S., 7 Howard 220; Stovall v. Banks, 77 U. S. 10, Wall 583; Washington Ice Co. v. Webster, 125 U. S., 426."

The question of the admissibility generally of judgments against sureties was considered extensively by the Supreme Court of Error of Connecticut, in the case of City of Bridgeport v. U. S. Fidelity & Guaranty Company, 134, Atl. 252, in which the Court said:

"The difficulty of again proving the case in which the judgment was rendered, perhaps long after the transaction out of which it arose, and the improbability that an owner would suffer a judgment to be rendered against him which was unjust, either through negligence, or incompetent defense, making its trustworthiness upon its face credible, are among the principal considerations which have led to the very general rule that such a judgment will in an action against a surety of the principal be prima facie evidence of the amount of the recovery, its payment under compulsion, and the cause of action upon which the judgment was rendered. This rule leaves open to the surety any defense he

> might have made had he been a party to the action against the principal. It places the burden of disproving the correctness of the judgment upon the surety. It is a rule of procedure, made for the benefit of the plaintiff litigant, and also made in the public interest. In the great majority of cases of this character the surety cannot successfully attack the judgment upon any of the grounds upon which it has been admitted as prima facie evidence, except for fraud or collusion: hence the rule of procedure tends to shorten litigation without depriving litigants of any substantial rights. The admission of the judgment file for this limited purpose in no wise conflicts with the rule that a judgment concludes none but parties or privies to it."

In Strathleven Steamship Company, Ltd., v. Beaulch, 244 F. 412, in a libel action the steamer Strathleven was found to be solely at fault for the collision with a loaded scow that a tug had in tow. After that action was finally determined the owner of the steamship Strathleven sued the pilot of the Strathleven to recover the loss it sustained. In its action against the pilot it offered the judgment roll in the libel case, to which the pilot had not been a party, in evidence. On this feature of the case, the Circuit Court of Appeals of the Fourth Circuit said:

> "Strictly speaking, the decision in the original case is not res adjudicta as to Beaulch, as he was not a party to the proceeding, but it is res adjudicta as to the finding and conclusion of negligence in the matter of the place and manner of

> anchoring the steamer for which the appellee was responsible, and his liability follows by operation of law."

There the fact determined in the prior case was the fault of the ship, here the question determined in the criminal case was the fault of the premises or building and it would appear, without question, under the authorities that the judgment roll was admissible, to say the least, as prima facie evidence of the fact.

V.

RIGHT TO A JUDGMENT FOR INTEREST.

Interest was claimed in the complaint of the plaintiff (R. p. 4); the jury at the direction of the Court, returned a verdict for the sum of One Thousand Dollars.

That statute of Montana, Section 8662, Revised Codes of Montana, provides:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that date, except during such time as debtor is prevented by law, or by the act of the creditor from paying the debt."

The recovery of the United States under the bond could not be less than One Thousand Dollars. The amount to be recovered was certain. The interest

to be allowed was not within the discretion of the jury, the jury had no discretion as to the giving or the withholding of interest; interest followed as a matter of course under the statute upon the return of the verdict.

In the case of Butte Electric Railway Company v. Matthews, 34 Mont. 487, cited by appellants in their brief is distinguishable here for that the Supreme Court of Montana there held that the interest was awarded by the jury in its verdict and of course interest on interest could not be recovered.

If, however, error was committed in this regard, it is not such error as would warrant the reversal of the entire judgment but could and would be cured by a reduction of that amount from the amount of the judgment. Chicago, Milwaukee, St. Paul & Pacific Ry. Co. v. Busby, 41 F. (2d) 617. Circuit Court of Appeals Ninth.

VI.

DID THE VOLUNTARY APPEARANCE OF THOMPSON GIVE THE COURT JURISDICTION OVER HIS PERSON?

While summons was issued in this action it was never served upon the appellant Thompson, neither did Thompson file any written pleading in the action, either a motion, demurrer or answer, prior to the time of trial. However, Thompson was present

in Court and represented by his counsel, as appears from the judgment in the case at Record page 24, and participated, with his co-appellants, actively in the trial of the case. Thus it appears from the record, at page 27, that objection was made by Mr. Donovan, representing Thompson, as well as the other two appellants, to the introduction in evidence of the first judgment roll, which was offered, one of the objections being that the Court had no jurisdiction over Thompson because he was not served with process, another objection being that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled and exception taken (R. p. 29). Again, at page 42 of the Record, Mr. Donovan objected to an introduction of evidence on behalf of the appellee on the ground that the Court had no jurisdiction over Thompson or over the sureties or any parties to this action. Such objection was overruled and exception taken. The objection was made by Thompson to each exhibit and all of the evidence offered by the appellee. The record discloses, on page 64, that Thompson again asked the Court for affirmative relief in his behalf by making a separate motion for a non-suit. At that point Thompson had evidently felt the Court had acquired jurisdiction over his person as he did not include jurisdiction over his person as one of the grounds upon which he requested the Court to grant a non-suit and didn't submit that question to

the Court. He excepted to the denial of the Court of his motion for a non-suit. The appellant Thompson rested with the other appellants, none of the appellants in the action submitting any evidence on his behalf whatsoever.

It is the universal rule that jurisdiction of the person may be obtained either by a proper service of process or that process and its service may be waived by a prospective defendant in an action, and a voluntary appearance made by him, the voluntary appearance being as effective in conferring jurisdiction of his person upon the Court as any jurisdiction gained by the service of process. If a defendant desires he may, of course, waive the service of process upon him and always does so by appearing voluntarily in an action. The filing of a pleading in an action is one of the ways, but not the only way that a voluntary appearance can be made. It can be made, as it was here made, when Thompson recognized the fact that an action was pending in Court, came into Court and participated in the trial and asked relief from the Court.

The general rule is laid down in 4 Corpus Juris at page 1334, where it is said:

> "A general appearance is also made by taking part in the trial; by contesting the case on the merits";

Judge Neterer, in Everett Railway Light & Power Co. v. U. S., 236 F. 806, at page 808, said:

> "I think this case must be determined upon the fact as to whether the appearing in Court by the defendant and obtaining the order of enlargement of time to answer was the doing of an act in the progress of the cause, and therefore a general appearance and submission to the jurisdiction of the Court. Appearance means the coming into Court as a party in a proceeding and asking relief in the progress of the cause. Thompson v. Michigan Mutual Ben. Ass'n, 52 Mich. 522, 18 N. W. 247. A party may appear in person or by his agent. Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. And if he does any act or asks any relief from which it may be presumed that he acknowledged the Court's jurisdiction, his act is an appearance. Barbour v. Newkirk, 83 Ky. 529, 532. Obtaining an extension of time to plead, answer, demur, or to take such other action as it may be advised is equivalent to a general appearance. Hupfeld v. Automaton Piano Co. (C. C.) 66 Fed. 788; Biggs v. Stroud (C. C.) 58 Fed. 717; Waters v. Central Trust Co., 126 Fed 469, 62 C. C. A. 45.
>
> "The fact that the motion was made orally does not qualify the appearance. Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191. A defendant having by oral motion caused the Court to make an order in the cause, thereby submitting to and invoking the jurisdiction of the Court, may not thereafter challenge the jurisdiction."

The rule in Montana is that the only manner in which the jurisdiction of the Court over the person of a defendant on the ground that he has not been

served with summons can be made, is by special appearance only, and that unless the appearance is special for that one purpose, the appearance is considered general and the Court obtains jurisdiction over the person. (Hinderager v. MacGinnis, 61 Mont. 312).

In Smith v. Franklin Fire Insurance Company, 61 Mont. 441, the Supreme Court of Montana held that a motion to set aside a default judgment upon the ground that the service of summons was ineffectual for any purpose in that the proper person was not served, constituted a general appearance on behalf of the defendant.

In Glenn v. W. C. Mitchell, 282 Fed. 440, the Circuit Court of Appeals for the Eighth Circuit said, at page 442:

> "We are satisfied, however, that, whatever may have been the defect in the service of the summons, it was waived by the defendant when he filed an application for an order to show cause, and prayed in that application that upon the hearing of the order said judgment might be opened up and defendant permitted to file an answer in the case to plaintiff's cause of action and to defend against the same. This general appearance waived all the defects in the service of the summons if there were any."

The Supreme Court of Idaho, in Miller v. Prout, et al, 197 Pac. 1023, said, at page 1024:

> "The record discloses, however, that upon the trial respondents consented to the introduction

of certain exhibits on the part of appellants Faull and wife, and also cross-examined Mr. Faull when a witness on his own behalf. We think that participation in the trial of a cause of action by examining and cross examining witnesses therein amounts to a general appearance, and is a waiver of service of process or of a cross-complaint."

To the same effect see Sheldon v. Landwehr (Calif.) 116, Pac. 44.

In Sterling Tire Corporation v. Sullivan (Gerlinger intervenor), 279 F. 336, this Court said, at page 339:

"Nor do we believe that, when associate counsel for the New Jersey corporation appeared in the later proceeding, the motion of the receiver for instruction and for compensation, counsel's statement that he appeared "specially" can be held to have been a special appearance. Like the action that had been taken previously by first counsel who appeared, the second appearance was in no way limited to objection to the jurisdiction. In both instances counsel recognized the case in Court and actively participated therein. In the one, the bond was prayed for; in the other, counsel sought a continuance of any action in order to learn the facts and wishes of his New Jersey client. The Court evidently considered his suggestions, and counsel signed and approved the order of the Court concerning a contingent voluntary appearance by the New Jersey corporation within a certain time and the disposition by the receiver of the property in the receiver's possession. 2 R. C. L. 327; 3 Cyc. 504; 4 C. J. 1333; Hupfeld v. Piano Co.

(C. C.) 66 Fed. 788; Ex parte Clark, 125 Cal. 389, 58 Pac. 22, Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191; State ex rel, Mackey v. Court, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622."

We respectfully submit that the several specifications of error are without merit, that no error appears in the trial of this cause, and that the judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN B. TANSIL,
United States Attorney for Montana.

R. LEWIS BROWN,
Assistant United States Attorney.

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No. 7745

United States
Circuit Court of Appeals
For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

LEO H. MARTIN,

Appellee.

Transcript of Record

Upon Appeal From the United States District Court for the Western District of Washington, Southern Division.

The Recorder Ptg. & Pub. Co., 460 Fourth St., S. F.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States For
The Western District of Washington
Southern Division

8354

LEO H. MARTIN,

Plaintiff

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT

For cause of action against defendant, plaintiff alleges:

I.

That during all the times herein mentioned defendant was and it now is a corporation, organized under the laws of the State of Washington, and during all of said times was engaged as a common carrier of passengers and freight by railroad for hire between the States of Oregon and Washington.

II.

That on the 21st and 22d days of April, 1932, and prior thereto, defendant was the owner of a certain railroad locomotive, No. 623, which was used on said days and prior thereto in the transportation of passengers and freight on a train being operated by defendant on a regular run between the cities of Portland, Oregon, and Spokane, Washington, and return, and on the 22d day of

April, 1932, said locomotive had just completed a trip between said cities and had transported passengers and freight for hire between said states, and had been taken into a roundhouse in the plant operated by defendant in the city of Vancouver, Washington, and said locomotive was being inspected before making the next run in such interstate commerce, which would occur within a few hours, when it was discovered by an inspector that the flanges on certain trailer [1*] wheels on said locomotive was worn and required to be repaired, so as to enable said locomotive to be used in interstate commerce for the transportation of said train on the aforementioned regular run.

III.

That during all the times herein mentioned defendant owned and operated railroad yards, engine roundhouses, machine shop and repair shop in said city of Vancouver; that certain railroad tracks ran between the roundhouse and machine and repair shops, and the said roundhouse and machine shop were also connected by certain decking, which was about 250 feet between the roundhouse and the machine shop; that railroad tracks in said roundhouse also connected with a turntable in defendant's plant, and said turntable connected with tracks which ran into defendant's said machine shops; that on said day the said decking had become worn and decayed, so that there were de-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

pressions in said decking, and the decking was rough and uneven, and knots were sticking up, and work trucks being hauled or pushed over said decking would become caught in said depressions and on knots or, owing to the decayed stringers and decking, would sink through the said decking; that there were two railroad tracks leading into the said machine shop and passing through said decking, and the planks of said decking over which track No. 3 ran were about even with the tops of the rails, and defendant had caused the ends of the planks next to the rails to be hewn or beveled off so that there was an incline on said decking running towards the said rail, all of which was well known to defendant and to defendant's foreman hereinafter mentioned, long prior to said day.

IV.

That during all the times herein mentioned plaintiff was employed by defendant as an engine wiper and to perform other duties assigned to plaintiff by one William Morrison, a foreman in [2] the employ of defendant at said Vancouver plant, and plaintiff was bound to and did obey the orders and directions given him by said foreman in the performance of his duties.

V.

That during all the times herein mentioned defendant used a certain skeleton truck to haul locomotive engine trailer wheels in and about its said plant; that said truck traveled on small wheels and

a channel iron about 12 inches in width was set between the two sets of wheels of the truck, and a slot was cut in one side of the channel iron so as to permit the wheels to roll into said channel iron, and the side of the flange of the wheel to rest on the end of the channel iron on the opposite side of the slot; that said channel iron was made fast to the axles of the truck and acted as a bed to form an ordinary dolly or truck; that the said truck was between six and seven feet in length and was between ten and twelve inches in width, and the axles were designed to travel about three inches above the decking, but on said day and for some time prior thereto the said truck was sprung so that one side thereof did not ride above the decking more than half an inch, which fact was well known to defendant and to defendant's said foreman prior to said 22d day of April 1932, and subsequent thereto; that said truck had a tongue with a loop for a handle. That said trailer wheels weighed upward of 4,000 pounds and said wheels are connected by a journal and are about four feet eight inches apart, and when said trailer wheels were placed on the truck the same sat endwise.

VI.

That by reason of the facts herein alleged the said truck, in being hauled across the said decking, would become caught or "hung up" in the depressions and uneven places in said decking. [3]

VII.

That on said day the aforesaid trailer wheels

were removed from said locomotive and were set endwise on said hereinbefore described skeleton truck, and said trailer wheels were to be transported thereon from said place in said roundhouse, across the aforementioned decking into defendant's said machine shop; that the pulling of said truck so loaded across said decking was under the direction of defendant's said foreman, and said foreman directed that plaintiff assist in said work, and it required the services of six or seven other employees of defendant in its said plant to pull and push said truck across said decking; that after said trailer wheels had been removed from said locomotive and placed on said truck, plaintiff was directed by said foreman to take a place inside the two wheels and push against the forward wheel, and other employees were directed to pull on the tongue, and others pushed on the rear; that in the course of pushing said truck over said decking, when the said truck arrived at a point near the track leading to the machine shop, which plaintiff believes to be known to defendant as track No. 3, the forward end of said truck became "hung up" in a depression in said decking, and immediately in front of the depression where said truck became hung up as alleged, the planking was hewn or beveled off as described.

VIII.

That thereupon defendant's said foreman directed that plaintiff secure a crowbar, and that another employee procure a pinchbar, and the said foreman

directed that plaintiff stand in a position between the trailer wheels and in close proximity to the journal, and to insert said crowbar under the forward trailer wheel which extended beyond the sides of the channel [4] iron, and to lift up on the same; that without any notice to plaintiff and without knowledge on plaintiff's part, defendant's said foreman had in the meantime directed that an employee pushing in the rear and who had secured a pinchbar, place the same under the rear end of the channel iron and to lift up on the same, and the said employee, prior to the time plaintiff lifted up on the said crowbar, had already lifted up on the rear end of the said trailer wheels with said pinchbar, and when plaintiff lifted up the forward trailer wheel with said crowbar, the said truck was raised above the depression in said decking and suddenly and with great force pushed forward down said incline, and the rear trailer wheel caught the heel of plaintiff's right foot, thereby causing plaintiff to sustain the injuries and damages hereinafter set forth.

IX.

That a practicable method of transporting said trailer wheels from the roundhouse to the machine shop was to place the same on the track leading from the roundhouse to the machine shop, and to roll the same on said truck into said machine shop and/or to place the same on the track leading to the turntable and to push the same onto the turntable and then turn the turntable track to connect

with the track leading into the machine shop and push the same into the machine shop.

X.

That the defendant by its employee was negligent and careless proximately causing the injuries to plaintiff, in the following particulars:

(1) that the method adopted by defendant's said foreman in transporting said trailer wheels by means of said truck across said decking was not a reasonably safe method of performing the work for the reason of the condition of said decking and the sprung [5] condition of said truck, as hereinbefore described;

(2) that after having undertaken to transport the said trailer wheels across the decking in the manner alleged, and the said truck having become caught in said depression, the defendant's said foreman should have directed four men to take crowbars or pinchbars and to place the ends of said crowbars two at the side on the forward end of the truck, and two other men with crowbars at the rear of said truck to pry on the rear end of said truck, and two men to hold the tongue of said truck for the purpose of guiding the truck, and then upon a signal given by said foreman all hands to lift and pry in unison;

(3) that defendant was further negligent and careless in maintaining said uneven and worn-out decking, and in using and operating a truck the side of which was sprung as aforesaid;

(4) that defendant's said foreman, after hav-

ing adopted the method of pushing said truck over said depression in the manner described, should have warned plaintiff of the danger of said truck slipping forward down said incline and should not have directed plaintiff to work in the position described.

XI.

That when the aforesaid trailer wheel caught plaintiff's right foot plaintiff sustained a spraining of the right sacro-iliac synchondrosis and a divulsion of the right sacro-iliac and the right symphysis pubis, all of which causes plaintiff great physical pain and permanent injury to his back and spine and the sacro-iliac and pelvic regions, causing plaintiff to become nervous and unable to sleep at night, and to suffer continual pain, and to be unable to follow his vocation as a machinist's helper, all to plaintiff's damage in the sum of Fifty Thousand Dollars ($50,000.00). [6]

WHEREFORE plaintiff prays for judgment against defendant for the sum of Fifty Thousand Dollars ($50,000.00) and for his costs and disbursements incurred herein.

WM. P. LORD
Attorney for Plaintiff [7]

State of Oregon
County of Multnomah—ss.

I, LEO H. MARTIN, being first duly sworn, on oath say: I am the plaintiff named in the above

entitled cause; I know the contents of the foregoing Complaint and believe the same to be true.

LEO H. MARTIN

Subscribed and sworn to before me this 28th day of March, 1934.

(Seal) MARIE BENNETT
Notary Public for Oregon
My commission expires

[Endorsed]: Filed April 2, 1934. [8]

[Title of Court and Cause.]

AMENDED ANSWER

Defendant makes this its answer to the complaint of plaintiff in the above entitled action:

I.

Defendant admits the allegations of paragraph I of the complaint relating to the organization and business of defendant.

II.

Defendant admits that on the 21st and 22nd days of April, 1932, and prior thereto, defendant was the owner of a certain railroad locomotive which had theretofore been used for the transportation of passengers and property by a scheduled train between the cities of Portland, Oregon, and Spokane, Washington; that after the completion of the last service of said locomotive in the movement of trains said locomotive was placed in defendant's

roundhouse in the City of Vancouver, Washington; that included in the work which was done on said locomotive while so placed in the roundhouse was the removal of said wheels and the making of certain repairs on said wheels, as alleged in paragraph II of the complaint; but except as so admitted defendant denies the allegations of said paragraph II. [9]

III.

Defendant admits that at the times referred to in the complaint defendant owned and operated railroad yards, a roundhouse and repair shops in Vancouver, Washington; that at the roundhouse was a turntable; that certain portions of the floor of defendant's roundhouse were covered by plank flooring, as alleged in paragraph III of the complaint; but except as so admitted defendant denies the allegations of said paragraph III.

IV.

Defendant admits that at the times referred to in the complaint plaintiff was employed at defendant's roundhouse and that William Morrison was a foreman in defendant's employ at said roundhouse, as alleged in paragraph IV of the complaint; but except as so admitted defendant denies the allegations of said paragraph IV.

V.

Defendant admits that at its roundhouse and shops in Vancouver it owned and used a certain truck designed for carrying engine trailer wheels,

and said truck was so designed to facilitate the loading and transportation of engine trailer wheels; that engine trailer wheels of the type being moved at the time of the accident referred to in the complaint weighed over 3000 pounds and were connected by an axle and were approximately four feet and eight inches apart on said axle, all as alleged in paragraph V of the complaint; but except as so admitted defendant denies the allegations of said paragraph V.

VI.

Defendant denies the allegations of paragraph VI of the complaint. [10]

VII.

Defendant admits that at the time referred to in the complaint certain trailer wheels were loaded upon said truck and were being transported in said roundhouse; that several employees of defendant were engaged in transporting said wheels; that plaintiff was a member of the crew at said time and place transporting said wheels; and that during the process of transporting said wheels the movement of said truck was interrupted, all as alleged in paragraph VII of the complaint; but except as so admitted defendant denies the allegations of said paragraph VII.

VIII.

Defendant denies the allegations of paragraph VIII of the complaint.

IX.

Defendant denies the allegations of paragraph IX of the complaint.

X.

Defendant denies the allegations of paragraph X of the complaint.

XI.

Defendant denies the allegations of paragraph XI of the complaint.

For a first further and separate answer and defense defendant alleges that the acts of the plaintiff at the time and place referred to in the complaint were negligent, in that plaintiff in performing his duties of assisting in moving said wheels, and particularly in using a bar, knowingly and unnecessarily placed himself in a dangerous position at a time when [11] plaintiff knew that said wheels were to be moved, and that said negligent acts of plaintiff caused or contributed to cause the injuries, if any, sustained by plaintiff at said time and place.

For a second further and separate answer and defense defendant alleges that at said time and place when plaintiff sustained injuries, if any, of which he now complains, plaintiff assumed the risk of such injuries, in that the dangers incident to the movement of said wheels and the use of the bar in the manner adopted by plaintiff, were open and apparent and were known and appreciated by plaintiff or should have been known and appreciated

by plaintiff if plaintiff had used his ordinary powers of observation, and that the risks thus assumed by plaintiff caused or contributed to cause the injuries, if any, of which plaintiff now complains.

For a third further and separate answer and defense defendant alleges that this court has no jurisdiction to hear and consider the cause of action set forth in the complaint, for the reason that there is no diversity of citizenship, since plaintiff is a resident of the State of Washington and defendant is a corporation organized under the laws of the State of Washington and is a resident of the State of Washington, that this action does not arise under the laws of the United States, and that there is no other ground whereby this court has or can acquire jurisdiction; and, in particular, that plaintiff, at the time and place of his alleged injuries, was not engaged in interstate commerce and that the Act of Congress relating to injuries to railroad employees while engaged in interstate commerce, known as the Federal Employers' Liability Act, is [12] not applicable in the present case, but that, on the other hand, plaintiff was engaged in the repair of a locomotive which, although it had theretofore been used in interstate commerce, had been withdrawn by defendant from interstate commerce and was then being held in defendant's roundhouse for extensive repairs.

For a fourth further and separate answer and defense, defendant alleges that:

Plaintiff heretofore brought and prosecuted an action in the Superior Court of the State of Washington in and for Clark County, wherein he was plaintiff and the defendant herein was defendant, and wherein plaintiff sought to recover from defendant damages upon the same cause of action as is attempted to be set forth in the complaint herein. Defendant appeared and answered in the said suit and in said answer defendant set forth, as a separate defense, that plaintiff was not entitled to recover because the injuries alleged to have been sustained by plaintiff were the result of risks of plaintiff's employment, which risks were assumed by plaintiff. Plaintiff thereafter filed his reply to said answer, denying the allegations of said further defense. Thereafter, upon the issues made by the pleadings as aforesaid, the case was tried in the said Superior Court for Clark County, before a jury, on or about October 31, 1933. At the close of plaintiff's evidence, defendant moved for a dismissal of said suit upon the grounds, among others, that plaintiff's evidence disclosed, as a matter of law, that the injuries, if any, sustained by plaintiff at the time and place mentioned in his complaint were proximately caused by risks of plaintiff's employment, which [13] risks were assumed by plaintiff. Thereupon the said Superior Court for Clark County heard arguments of attorneys for both parties, and, after due consideration, determined that plaintiff's evidence disclosed that, as a matter of law, injuries, if any, sustained by plaintiff at the

time and place alleged in his complaint were proximately caused by a risk of the employment, which risk was assumed by plaintiff, and thereupon discharged the jury from further consideration of the case and entered its judgment in favor of defendant. By reason of the facts herein set forth the said judgment of the Superior Court of the State of Washington in and for the County of Clark is a bar to this action by plaintiff for the same cause asserted in said action in said Superior Court and the matters adjudicated in said action in said Superior Court are res adjudicata.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant shall have judgment for its costs and disbursements herein.

CHARLES A. HART
FLETCHER LOCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant [14]

State of Oregon
County of Multnomah.—ss

I, A. J. WITCHEL, being first duly sworn, say that I am the Secretary of SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, defendant in the above entitled action, and that the foregoing answer is true as I verily believe.

A. J. WITCHEL

Subscribed and sworn to before me this May 9, 1934.

(Seal) PHILIP CHIPMAN
Notary Public for Oregon

My commission expires: Aug. 23 1935

Due service of the within amended answer is hereby accepted at Portland, Oregon, this 7th day of May, 1934, by receiving a copy thereof duly certified to as such by of attorneys for Defendant.

LORD
Attorney for Plaintiff

[Endorsed]: Filed May 11, 1934. [15]

[Title of Court and Cause.]

REPLY

Now comes plaintiff and replying to defendant's answer and to its first, second and third further and separate answers and defenses, denies each and every allegation, matter and thing therein contained, except so much thereof as is expressly set forth and alleged in and by plaintiff's complaint herein.

WHEREFORE plaintiff reiterates the prayer of his complaint.

WM. P. LORD
Attorney for Plaintiff

State of Oregon
County of Multnomah.—ss.

I, WM. P. LORD, being first duly sworn, on oath say: I am the attorney of record for plaintiff herein; I know the contents of the foregoing Reply and believe the same to be true. I make this verification for the reason that plaintiff is not at this time within the State of Oregon.

WM. P. LORD

Subscribed and sworn to before me this 24th day of April, 1934.

(Seal) MARIE BENNETT
Notary Public for Oregon

My commission expires Feb. 17, 1937

Service by copy admitted this 24th day of April, 1934.

CAREY, HART, SPENCER & McCULLOCH
of Attorneys for Defendant.

[Endorsed]: Filed April 25, 1934. [16]

[Title of Court and Cause.]

VERDICT

We, the jury empanelled in the above-entitled cause, find for the Plaintiff and fix his damages in the sum of Fifteen Thousand Dollars ($15,000.)

J. H. MOOS (Signed)
Foreman

[Endorsed]: Filed Sept. 29, 1934. [17]

In the District Court of the United States for the Western District of Washington,
Southern Division
No. 8354

LEO H. MARTIN,

Plaintiff,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Defendant.

JUDGMENT ON THE VERDICT

This day, to-wit: November 13, 1934, this cause came on for hearing upon the motion of the plaintiff for a judgment on the verdict, the plaintiff appearing in person and with his attorneys and counsel, Harry Ellsworth Foster and Wm. P. Lord, and the defendant appearing through its attorneys and counsel, Charles A. Hart, Fletcher Rockwood and Carey, Hart, Spencer & McCulloch, and it appearing to the court that the jury duly impanelled to try the cause returned a verdict for the plaintiff in the sum of Fifteen Thousand Dollars ($15,000.00) on the 29th day of September, 1934, and, the court now being fully advised in the premises, it is therefore

ORDERED, ADJUDGED and DECREED that the plaintiff have and recover from and of the defendant the sum of Fifteen Thousand Dollars ($15,000.00), together with his costs and disbursements herein to be taxed.

DONE in open court this 13th day of November, 1934.

EDWARD E. CUSHMAN
Judge

Service admitted.

CARY, HUNT, SPENCER & McCULLOCH
Attys for Deft.

[Endorsed]: Filed Nov. 13, 1934
J. & S. 3 P. 850 [18]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

The above entitled cause came on for trial before the Honorable Edward E. Cushman, one of the judges of the above entitled court, sitting in the United States District Court for the Western District of Washington, Southern Division, in the city of Tacoma, Washington, and a jury duly empaneled and sworn to try the cause, on the 27th day of September, 1934, at ten o'clock A. M., plaintiff appearing in person and by Mr. Harry E. Foster ~~and~~ Mr. William P. Lord, his attorneys, and defendant appearing by Mr. Fletcher Rockwood ~~and Messrs. Carey, Hart, Spencer & McCulloch~~, one of its attorneys.

At the opening of the trial and before the opening statement of counsel and before any evidence was received, defendant moved to dismiss the ac-

tion upon the ground that the court had no jurisdiction, and said motion was based on the pleadings and the facts set forth in a certain stipulation of the parties subsequently received in evidence as plaintiff's exhibit 4, and quoted in full in subsequent pages of this bill of exceptions, and after having heard the arguments by attorneys for both parties, the court denied said motion. The court's [19] action in ruling upon said motion to dismiss is shown in the following transcript of the proceedings at that time:

"THE COURT: In the Bezue case it went up from a State court. Direction was not to dismiss the case on its reversal.

It appears to the Court that this case should be distinguished from the Bezue case. There, the—as pointed out by the attorney for the defendant, the wheels being moved by the—it was injury, and not death, was it not?

MR. ROCKWOOD: I believe it was, yes, sir.

THE COURT: (Continuing)—by the injured man; had theretofore been removed from the engine; had been in the shop for a considerable time, and being returned to the engine to be replaced.

In the present suit it is clear that the engine was one used in interstate commerce; that immediately before had been in such use; that it was intended to be returned to such use; the stipulation is not detailed there, specific, but

the Court goes to Paragraph 7 of the complaint.

'That on said day the aforesaid trailer wheels were removed from said locomotive and were set endwise on said hereinbefore described skeleton truck; said trailer wheels were to be transported there from said place to said roundhouse across the aforementioned decking into the machine shop.'

Now, it was in the—as the Court understands the stipulation and pleadings, it was during that movement that plaintiff was injured.

The engine being generally an instrument of interstate commerce, and immediately theretofore an instrument in such commerce, to warrant dismissal it should be reasonably certain that the work being performed by the plaintiff at the time of his injury was so far removed in point of time, and nature, from that commerce as to not be an incident of it. It does not appear with any such degree of certainty such was the fact.

The motion will be denied.''

To the action of the court in denying said motion, defendant duly excepted and an exception was allowed.

During the direct examination of W. E. McCarty, a witness called and sworn on behalf of the plaintiff, questions [20] were propounded to the witness to which defendant objected upon grounds

(Testimony of W. E. McCarty.)

then specified, and objections were overruled, and defendant excepted to said ruling, and exceptions were allowed, as shown in the following:

"Q. What was the size and weight of those wheels as compared with the wheels shown in defendant's Exhibits A-1 and A-2?

MR. ROCKWOOD: I object as incompetent, irrelevant and immaterial. There is no allegation in the complaint upon which—to which this testimony can point. The fact is, this man knew what wheels were on the truck, and what the truck was used for, previously, thereto, is immaterial.

THE COURT: Objection overruled.

MR. ROCKWOOD: Exception.

THE COURT: Allowed.

(Question read).

A. Well, I have to just guess that. The pony truck wheel, I judge probably weigh, axle and all, wouldn't weigh over fifteen hundred pounds.

Q. And how long was it after that truck was built before they started carrying the wheels shown in the exhibits referred to?

A. Well——

MR. ROCKWOOD: Same objection.

THE COURT: Objection overruled.

MR. ROCKWOOD: Exception.

Q. How long did the S. P. & S. have that skeleton truck before wheels of that type were carried upon it?

(Testimony of W. E. McCarty.)

A. I couldn't state definitely that.

Q. Well, approximately?

A. Well, that truck, if I remember right, was built when Mills came in there as foreman—general foreman. I couldn't state just when that was.

Q. Could you give us the year?

A. It might have been a year. I don't know." (121-122) [21]

After plaintiff had rested his case in chief, and defendant had called witnesses and rested its case, plaintiff called in rebuttal a witness, Roy Buttner, and on direct examination of said witness on rebuttal, a question was asked of the witness, to which defendant objected and the objection was overruled and defendant excepted thereto as shown in the following:

"Q. Do you know when the floor in front of the clock where this accident happened was repaired?

MR. ROCKWOOD: Just a minute. I object to that as incompetent, immaterial and irrelevant, and improper rebuttal.

MR. FOSTER: Defendant's witnesses testified it was repaired before this accident.

THE COURT: Objection overruled.

MR. ROCKWOOD: Exception.

THE COURT: Allowed:

A. It was repaired some time after the accident." (206)

(Testimony of W. E. McCarty.)

After plaintiff had rested his case in chief, and defendant had called witnesses and rested its case, plaintiff called in rebuttal a witness, Price Buttner, and on direct examination of said witness on rebuttal, a question was asked of the witness, to which defendant objected and the objection was overruled, and defendant excepted thereto, as shown in the following:

> "Q. With reference to the occurrence of this accident, do you know when the floor at that point was repaired?
>
> MR. ROCKWOOD: Same objection I made to the question of the previous witness.
>
> THE COURT: Objection overruled.
>
> MR. ROCKWOOD: Exception.
>
> THE COURT: Allowed.
>
> A. A short time after the accident." (208) [22]

After both parties had rested, defendant moved the court to dismiss the case upon the ground that the court had no jurisdiction, and said motion was denied and defendant excepted thereto, as shown in the following:

> "At this time I wish to move for a dismissal of the case on this ground, the federal court and particularly this Court has no jurisdiction to hear this case, because the evidence, consisting of the stipulation and the testimony of witness Morrison, shows that the plaintiff at the time of his injury was not engaged in in-

terstate commerce within the meaning of the Federal Employers' Liability Act.

The burden is upon the plaintiff to prove the jurisdictional fact, and I wish to rest my motion upon the further ground that the plaintiff has failed to sustain the burden of proving the jurisdictional fact, upon which the jurisdiction of this Court must rest.

Now, if you wish to have me argue further on that point before I make my next motion, I will.

THE COURT: Motion denied.

MR. ROCKWOOD: Exception, please.

THE COURT: Allowed." (208-9).

After both parties rested and before the case was argued to the jury, defendant moved the court for a directed verdict in its favor upon grounds, as shown in the following:

"MR. ROCKWOOD: Now, at this time the defendant moves for a directed verdict in its favor on the ground that the plaintiff has failed to sustain the burden of proof to show that the —any negligence of the defendant alleged in the complaint was the proximate cause of this accident; upon the ground that the evidence is insufficient to prove that the defendant was negligent in any of the respects charged in the complaint, and upon the ground that it appears affirmatively and as a matter of law that the injuries sustained by the plaintiff, as

alleged in the complaint, were proximately caused by risks of the employment which were assumed by the plaintiff." (209). [23]

After hearing argument by counsel for defendant in support of said motion for a directed verdict, the court denied said motion, and to the denial of said motion defendant excepted and said exception was allowed, as shown in the following:

"THE COURT: Motion denied. The question does not appear to be close, insofar as negligence and proximate cause is concerned. It may be a closer question regarding assumption of risk, but even so, taking into consideration the fact that the Court must give the testimony for the plaintiff the most favorable construction on a motion of this kind, in which it is reasonably susceptible—the plaintiff testifies that after having tried to —having been directed by Mr. Morrison to pry on this wheel, after having attempted to do so in a position away from the axle, he was told to—I can not quote it, but he was directed to get a more direct purchase on it, in effect.

MR. ROCKWOOD: I do not believe there is any testimony Mr. Morrison or anyone else told him anything except to get a bar, and after he had got the bar, I believe I am right in stating there is no testimony whatsoever there was any further instructions. Is that not right?

MR. FOSTER: As I remember the testimony, he was directed precisely what to do.

MR. ROCKWOOD: To get a bar and put under the wheel, and raise it.

MR. FOSTER: I think it was more precise than that.

THE COURT: While it is true that the defense of contributory negligence is only a partial defense, yet there are certain well recognized rules in relation to a defense of contributory negligence that necessarily apply on this matter of assumption of risk. The particular one I have in mind is that where it is the Court or the jury that is considering the question, one of the things that must be taken into account is the opportunity to realize the danger. Now, the danger in part did not consist of something coming up behind and striking him, but it consisted in the relation that—that his foot, his left foot when he was pushing it with his weight on the ball of that foot, and his heel raised—the relation that would exist between that and the distance between the tread of the wheel on this truck, and [24] the floor—the decking, on which the ball of his foot rested, as the Court assumes, may well have been, that his body was extended and muscles rigid, and his foot held very firmly on the decking. Now, it may reasonably be assumed that he did not realize the exact—or the position that was

going to bring his foot and ankle, in relation to the tread of the wheel.

The Court cannot say that reasonable men might not conclude that he did not realize that danger.

Motion denied.

MR. ROCKWOOD: Your Honor please, may I have an exception?

THE COURT: Exception allowed." (210-212).

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

"In his complaint, plaintiff charges that the defendant was negligent in that the method adopted by the defendant's foreman in transporting trailer wheels was not reasonably safe by reason of the condition of the decking or flooring of the roundhouse, and by reason of the sprung condition of the truck upon which the wheels were being moved. I instruct you that the evidence shows that plaintiff, before he began the particular task in which he was engaged at the time of his alleged injury, was aware of the condition of the flooring and was aware of the condition of the truck which caused the truck to stick or stall while being used in the transportation of trailer wheels. Likewise plaintiff knew, or in the exercise of his ordinary powers of observation, should have

known of the dangers incident to the condition of the floor and the condition of the truck. Consequently, plaintiff, when he began the task, assumed the risk of dangers arising from the condition of the floor and the condition of the truck. Since plaintiff assumed the risk of the dangers I have mentioned, he cannot recover from the defendant for injuries which he may have sustained on account of the condition of the floor and the condition of the truck. For those reasons, the allegations of negligence with respect to the condition of the floor and the condition of the truck are withdrawn from your consideration and you cannot base any recovery by the plaintiff on those allegations of negligence." [25]

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that the evidence showed that the plaintiff had assumed the risk of dangers arising from the condition of the floor of the roundhouse, and said exception was duly allowed.

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

"One of the allegations of negligence set forth in plaintiff's complaint is, briefly, that the defendant's foreman should have directed four men to take crowbars and to place the ends

of the crowbars, two at the side of the forward end of the truck and two at the rear of the truck, and should have directed two men to hold the tongue of the truck to guide it, and that the foreman should then have given a signal for all workmen to lift and pry in unison. I instruct you that the evidence discloses that plaintiff was fully aware of the manner in which the work was being done in order to move the truck forward after it had stalled just before the plaintiff was injured, as he alleges. The dangers inherent in the method of work as actually done were as apparent to plaintiff as to the defendant or any of its employees. For that reason it follows that the plaintiff assumed the risk of injuries, if any, which may have resulted from the fact that the method then adopted was being used. For that reason you cannot base any recovery by plaintiff upon the charge of negligence with respect to the number of men working on the truck at the time of the alleged accident and the charge with respect to the number of crowbars then being used."

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that plaintiff was shown to have assumed the risk of injuries in the respect charged in the complaint and referred to in the instruction, and said exception was duly allowed. [26]

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

> "The complaint alleges, as one charge of negligence, that the defendant was negligent and careless in maintaining the floor in an uneven and worn-out condition and in using a truck the side of which was sprung, as alleged in the complaint. I instruct you that the dangers inherent in the operation of movement of the trailer wheels by the truck over the floor in its then condition, and with the truck in its then condition, were as apparent to the plaintiff as to the defendant and for that reason plaintiff assumed the risk of injuries resulting from the movement of the truck in its then condition over the floor in its then condition. For that reason you cannot base any recovery by plaintiff on the allegation of negligence with respect to the condition of the floor and the condition of the truck."

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that plaintiff was shown to have assumed the risk of injuries in the respect charged in the complaint and referred to in the instruction, and said exception was duly allowed.

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

"The complaint alleges that the defendant was negligent in that the foreman, after adopting the method of movement of the truck in the manner alleged in the complaint, should have warned the plaintiff of the dangers of the truck moving forward as alleged in the complaint and should not have directed the plaintiff to work in the position described. I instruct you that the dangers inherent in the performance of the work as was done by the plaintiff after the truck had stopped were obvious to anyone using his ordinary powers of observation. For that reason there was no duty upon the defendant or its foreman to warn plaintiff of such dangers. There is no duty upon a master to warn a servant of dangers of the employment which are open and obvious and which should [27] be discovered by the servant in the exercise of his ordinary powers of observation. Consequently that charge of negligence which I have just referred to is entirely withdrawn from your consideration and you are not permitted to base any recovery by the plaintiff on that charge of negligence."

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that plaintiff assumed the risk of danger of the truck moving forward, and said exception was duly allowed.

The evidence and the proceedings at the trial, necessary to present clearly the questions of law involved in the rulings to which exceptions were reserved, are set forth in the following

CONDENSED STATEMENT OF EVIDENCE

At the opening of the trial and before the jury was empaneled, there was filed with the clerk a stipulation signed by attorneys of record for the respective parties which, with caption, title, and signatures of attorneys omitted, reads as follows:

> "It is hereby stipulated between the parties hereto through their respective attorneys, as follows:
>
> The number of the locomotive from which the trailer wheels, which plaintiff was assisting in moving at the time and place alleged in the complaint, had been removed, was No. 622 instead of No. 623, as alleged in the complaint.
>
> Locomotive No. 622 was owned by defendant at the time of the accident and was of a type suitable for service on passenger trains. The last transportation service in which said locomotive was used by defendant prior to April 22, 1932, was on defendant's passenger train No. 1, which left Spokane, Washington, in the evening of April 15, 1932, for movement to Portland, [28] Oregon. Said train handled interstate commerce. Said locomotive, however, was operated on said train from Spokane only to Vancouver, Washington, and while said

locomotive was used on said trip, the operation of said train was entirely within the state of Washington. Said train arrived at Vancouver, Washington, at about 7:05 A. M. April 16, 1932. Said locomotive was then uncoupled from said train and operated to defendant's roundhouse at Vancouver, Washington. It arrived at said roundhouse at 7:15 A. M. April 16, 1932.

The next transportation service in which said locomotive was used began at 7:05 A. M. April 23, 1932. At that time it was attached to defendant's passenger train No. 1 at Vancouver, Washington, and hauled said train to Portland, Oregon. Said train handled interstate commerce.

Said locomotive was continuously in said roundhouse at Vancouver, Washington, from the time of its arrival at 7:15 A. M. April 16, 1932, until it was moved from said roundhouse the morning of April 23, 1932, for use on said passenger train No. 1 on said day.

Said locomotive was one of a group used by defendant in passenger service, and, when in service, said locomotive was customarily used on passenger trains Nos. 1 and 2 between Spokane, Washington, and Portland, Oregon.

The normal cycle of use of a locomotive in service continuously on said passenger trains Nos. 1 and 2 was as follows:

First Day:

Leave roundhouse at Vancouver, Washington, in the morning; haul train No. 1 from Vancouver, Washington, to Portland, Oregon, to arrive at Portland at approximately 7:30 A. M. Remain in Portland during the day; leave Portland in the evening to haul passenger train No. 2 from Portland to Spokane.

Second Day:

Arrive Spokane in the morning; remain in Spokane during the day; leave Spokane in the evening to haul passenger train No. 1 from Spokane to Vancouver, Washington.

Third Day:

Arrive Vancouver, Washington, at approximately 7:05 A. M. Uncouple from train and proceed to roundhouse at Vancouver, Washington. Remain [29] in roundhouse during the day.

Fourth Day:

Remain in the roundhouse until removal in the morning, to be attached to train No. 1 for movement from Vancouver, Washington, to Portland, Oregon, to commence another cycle.

At the time said locomotive No. 622 arrived at Vancouver, Washington, and was removed to the roundhouse the morning of April 16, 1932, it was reported by the engineer who had been operating said locomotive in its last transportation service that 'lower rail of engine

frame broken left side just over back engine truck wheel'. Because of that defect, the engine was at that time not suitable for further transportation service until said defect had been repaired. After the arrival of said locomotive at the roundhouse the morning of April 16, 1932, and while it was in the roundhouse in the interval from April 16 to April 23, 1932, the repair work done upon said locomotive, as indicated in the original locomotive inspection report, a part of the records kept by the defendant company in compliance with regulations and orders of the Interstate Commerce Commission, was as follows:

'REPAIRS NEEDED	Repaired by
lower rail of engine frame broken left side just over back engine truck wheel	Beard & Smidth
Glass broken in headlight	J. B.
back corner of mud ring leading (copied W. J. M.)	Renas
1. Key all rods & L butt end brass cracked	Englehart welded main
2. Put split key L. #2 brake shoe bolt	Englehart
3. Bolts broke and loose in braces top pilot beam	J. B.
4. Pilot loose	J. B.
Washed boiler	Hickman

5. Frame broke over L #2 eng truck	Beard & Smidth
6. Bolts loose front end L inside trunion frame	Englehart
7. Clamp loose keeley pipe R B cor eng	Groethie
8. Bushing wore both M Equalizers (inspected and found serviceable) (W.J. M.) Trailer tires turned on account of shelling	Waggle
9. Set up all wedges	Englehart set up wedges
10. Tighten all binder bolts	Englehart [30]
11. L M Brass 3/32 & R M Brass 1/16 loose in boxes (Inspected and found serviceable W. J. M.)	
12. Bolts working splice front L. #1 driver	Englehart
13. Binder bolts bent and loose L #2 eng truck	Englehart
14. Put wheel on Keeley valve over L. #2 eng truck	Groethie
15. R. #2 driver strikes spring saddle (Throwed—McNerney)	
16. Handle loose on valve at B End R main driver	Groethie

17. Steam pipe loose to R. Ing.	Groethie
18. R # 3 spring slipped in band (inspected and found serviceable—W. J. M. slipped ¼″)	
19. Bushing wore R Eccentric rod (copied 4-16-32 O. F.) (inspected and found serviceable W.J.M.)	
20. Glass broke in H. L. Cage	J. Beedle
21. Blower pipe leaks where screws in manifold (copied 4-16-32 O. F.) W. B. Livesay, Inspt. 4-16-32—10 A. M. Replaced brick on back wall where removed to calk leak	Groethie Albert.'

Upon the removal of trailer wheels which plaintiff was assisting in moving at the time when, by his complaint, he alleges that he was injured, said locomotive was not in condition for use in any transportation service.

The facts herein stated are admitted by both parties and this stipulation may be used by either party at the trial of the above entitled case without further proof of the facts herein stated.

Both parties reserve the right to offer any additional testimony competent to prove any facts relevant under the issues raised by the pleadings relating to the nature of the use of said locomotive No. 622, the nature of the repairs performed on said locomotive during the period between April 16, 1932, and April 23, 1932, and relating to the condition of said locomotive at the time referred to in the complaint.

Dated September 22nd, 1934."

and said stipulation was subsequently received in evidence as plaintiff's Exhibit 4 (165). There was received in evidence [31] upon the offer of plaintiff, plaintiff's Exhibit 1, which consists of a wooden model of a truck and of locomotive trailer wheels owned by defendant, more particularly described in subsequent testimony. (38).

Prior to the calling of witnesses by plaintiff, and with the consent of counsel for plaintiff, there were offered and received in evidence four photographs designated respectively defendant's Exhibits A-1, A-2, A-3, and A-4. (38-39).

LEO H. MARTIN, the plaintiff, produced as a witness in his own behalf, testified as follows:

Direct Examination.

My name is Leo H. Martin. (40). I live at Vancouver, Washington. My family consists of a wife and two children. (40). I was employed by defendant Spokane, Portland and Seattle Railway

(Testimony of Leo H. Martin.)

Company as an engine viper from August 15, 1929, until April 22, 1932. (40). When engines come into the roundhouse engine vipers clean them up and clean up the wheels and the running gear before they go back onto the road. (41). During the month of April I had other duties. I did whatever kind of work I was ordered to do by the foreman and assisted generally around the roundhouse. (41). The weight of the wheels of the engine involved in this case is a little over two tons. The distance between the wheels is around four feet, four feet and some inches. (42). The length of the channel iron of the truck involved in the case is around six feet or a little better. I cannot say just how long the goose neck of the truck is. (42). The tongue of the truck is about four feet long. (42). The truck had one set of wheels on the rear of the channel iron (42) and "two regular little truck wheels set together in front". (42). [32] The height of the side of the channel iron was around an inch and a half or two inches, and the thickness of the bottom was about half an inch "as near as I could figure. Maybe not quite that thick". The truck was constructed of steel. (42). Defendant's Exhibit A-4 is a picture of the truck that I was injured on. (42). Defendant's Exhibit A-6 is a picture of the same truck taken outside of the shop. (42). Defendant's Exhibit A-5 is a picture of the truck with trailer wheels loaded on the truck, and defendant's Exhibit A-1 is another view of the truck loaded

(Testimony of Leo H. Martin.)
(43). The roundhouse includes, first, a boiler shop, then the running repair department, then the back shop, and then the machine shop set off—kind of an ell. (43). On the occasion in question, the distance that I was required to transport the wheels was between three and four hundred feet over a plank floor, "two by twelve, if I remember right". The state of repair of the planking was very poor. The planking has knots along it, quite a few knots, and then they use pretty good sized spikes to drive that down, and there are places from dragging such things as the truck over the floor where the floor was wore down and these knots stick up and then some of the nails stick up and bend over where you run into them. (43-44).

The tracks in the roundhouse run up to within ten feet of the wall, all the way along, until we come to a point where there are two tracks that run to the machine shop. (44).

The accident in question happened about eleven o'clock, "as near as I remember", in the forenoon. (44). I received orders to assist in moving the wheels about fifteen or twenty minutes before eleven, I could not say for sure who gave me the order. The order was given by one of the foremen. (44). [33] I received orders to help move these trailer wheels into the back shop. I was in the roundhouse at the time. I had to go about the distance of a couple of engines to the point where I was to work. I cannot tell where the truck was,

(Testimony of Leo H. Martin.)

but we were ordered to get the truck and bring it there and load the wheels. (45). After receiving the orders, we first went after the truck. The wheels were in the roundhouse. About seven or eight men were engaged in the work of moving the wheels. (45). I can give the names of some of the men. They included Harry Pickett, Dave Reeder, Price Butner, Frank Pedore—I am not sure about Pedore. He might not have been there. (46). To get the wheels on the truck, we would take this truck up there to the rails and roll the wheels off in this case where we was going to the machine shop, off on to the floor, on to this plank floor, and then take a couple of blocks and put underneath it right up next to the cart, and then roll these wheels—back them up and take a run at it, and roll these wheels up on the cart. (46).

When the truck was empty, the distance from the channel iron to the floor was around an inch. When it was loaded, one side was lower than the other because it was sprung out of shape on this side where it was cut. (46). After the truck was loaded, I could not say exactly the distance between the channel iron and the floor, but it was probably around a half inch. (47). The rest of the truck was not changed in its position with relation to the floor after loading, "only the front end of it was all that sprung down that I know of". (47). After loading, the wheels were so heavy on it, it would spring down towards the floor, closer, all the time. (47).

(Testimony of Leo H. Martin.)

At the time in question, the condition of the truck was poor. It was cut down on the side, [34] and was sprung down. The heavy loads on it had caused it to bend down on that side where the cut is on the side of it for the wheels to roll in on the right side. It is cut more on the left side and therefore it was weaker than it was on the other side. (48).

After we loaded it, we had put probably a man on each side of the axle, maybe one or two behind, and a couple on the tongue, and maybe a man on the side of the wheel where the cart sagged down to hold it there to keep it from rolling off. (48). After the truck was loaded, I received no orders about moving the truck until "we got hung up there". (49). After we started moving the truck, nothing happened until we got to this place where it was stuck. (49-50). It came on to a little depression there in the floor and we could not push it any farther. It was stuck there. The front end was sprung down. Where there were places in the floor higher than others, why, it would hang up on the floor. The weight on the front end of the truck squashed it down and kind of sprung the channel iron—just kind of opened it up there where the holes were cut in the side of it. (50). After the truck stuck, I received orders from Mr. Morrison, the foreman on the job. When Mr. Morrison issued the orders, he was standing across from me on the other side of it (50) around five or six feet from me, something like that. (51). At that time he was

(Testimony of Leo H. Martin.)

standing there watching what was going on. He was roundhouse foreman, that is, the running repair foreman. (51). He was in charge of the truck at this time and was taking it in there. (51). The order which he gave to me was, "Martin, get that bar and put it under the wheel there, and see if you can't——". (51). As near as I can remember, he said, "Martin, get that bar and put it under the wheel and raise [35] up on it and see if you can get that raised off that high place." (51-52). The bar was standing up against the wall. The bar was around six feet long. I got the bar and put it under and raised up on it. (52). I cannot say whether any one else was given any orders at that time. I know that another man got a bar and put it under the back end of the truck. (52). Harry Pickett was the man. I cannot say whether Pickett received any orders in that respect. (52).

After I got the bar, the foreman did not give me any orders to the use of it after I got over to the truck, he just told me in the first place to take the bar and put it under the wheel and see if we could raise it up. (52).

As near as I can remember, one man with a bar was working on the wheel directly behind me. (53). The foreman was standing on the other side of the journal from me. He had a view, the same as I would have standing off from the side of anything like that, about four or five feet. (53). The fore-

(Testimony of Leo H. Martin.)

man's view was such that he could see all of the crew. (53).

After I got the bar I put it under the wheel and raised up on it, and the flange is slick on those wheels, smooth and slick, wore that way. They were worn off too much to run on the track any more, and this bar would slip up around the edge of the flange, and so when the bar slipped up, I tried it there a couple of times, and when it slipped up, I moved over so that I could get a hold on it where it would not slip up the side of it, and I did move around next to the axle and got a hold of it and raised up. (53). It slipped off about twice, as I remember. After it slipped off, I did not receive any additional orders from my foreman. (54). When I raised up on there, the cart shot ahead. Ordinarily when I would use a bar it would move [36] probably the length of the bite I had, just get off the bar and then stop, but at this particular place, there is a little slope there where it goes down to the tracks, and where the rail comes through there, and I may be behind the wheels when I was coming along there pushing, I was not paying any attention to what was ahead of it because we never moved fast enough to run over anything, " . . . so then, I—when it moved off of there, why it just went right down this place where this fellow with the bar on the back end of it, you see, and me raised up there, took enough weight off of it to take it over the knot, or the high place on the floor, and

(Testimony of Leo H. Martin.)

this other man with the bar on the back end raised up on it, and on this slick iron, and slope, it just shot ahead and caught me on the back of the right foot and just twisted my leg out and I grabbed—I took a hold of the front wheel, with my hand on the front wheel and struck me on the back and went down to my knees, and my foot rolled off from under the edge of it, and then I pulled myself up on it." (54).

I did not know there was a man behind with a bar until the cart had stopped. I knew that there was a man went after another bar, but I did not know that he was there at the time. (55).

After I started prying, I received no warning directions or orders from the foreman.

When I raised the wheels with the bar to raise the weight off the cart so that it would move ahead, this wheel on the back caught me on the ankle, that is, just above the ankle in the back of my foot, and just kind of crushed it into the floor, and it was just turned—just twisted my leg and tore a joint loose in my back and I dropped over and took ahold of the flange on the front end, and I pulled myself up and got out of [37] there. The car stopped when it hit the track down below there. (55-56). I went to my knees. Just at the time I went down, and as I was raising myself up, Mr. Morrison looked over and said, "What is the matter, Martin, you get hurt?" and I said "I guess so". I straightened up the best I could and got out of the way of the

(Testimony of Leo H. Martin.)

wheel. After that I leaned up against the wall until I could get out of there, and finally I got so I could walk a little bit, crawl around, and went back in the roundhouse. I did not continue my duties the balance of the day. I did not assist in moving the truck any more. I stayed around until quitting time, and then went to the office and called my wife to come after me. (56-57).

At the time of the accident there were other methods available in the roundhouse for moving truck wheels. I could not say for sure just which tracks were clear and which ones were not, but at times we have rolled the wheels out of the door of the roundhouse and rolled them out on another track, and then down around the outside of the roundhouse and into the machine shop, and the track runs right into the machine shop and into the lathe, where they pick them up with the hoist, and put them on the machine, and then the other way around, on to the turn table, there is two tracks running in there, one on each side of the lathe. (62-63). The truck was used for smaller wheels, too, like pony trucks, and the front of the engine.

I do not know whether the truck was in use prior to 1929, before I came into the shop. (63).

Cross Examination.

I am thirty years old. I began to earn my living at [38] manual labor when I was about fifteen years old, and ever since that time I have worked on and

(Testimony of Leo H. Martin.)

off at manual labor. I was engaged at several places in eastern Oregon working on ranches, and on those ranches, did the heavy work of a ranch hand. (64). I worked for Swift & Company, running an electric drier and baler, which is manual labor. (64). I was in the army three years, eleven months and twelve days, and while in the army, some times did heavy labor. (65). I worked for the Spokane, Portland and Seattle Railway Company not quite three years, and during all of that time worked in the shops at Vancouver. At the time of the accident in April, 1932, I was on the payroll as a laborer. (65). During my work for the SP&S, I have done heavy manual labor. (65). I was familiar with the job of doing heavy manual labor, at least I got by. (66). At different times while I worked in the roundhouse, I had occasion to assist in moving heavy machinery. I had worked a good many times moving this particular truck with trailer wheels on it. I knew for a long time that the floor was rough from the movement of heavy machinery over it, and I had seen these bumps in the floor caused by knots in the plank many times, and I had seen these places where nails were sticking up in the floor many times before this accident happened. (66).

"Q. It was not very much about that plank flooring that you did not know about, was it? You knew things fairly well before this thing happened, didn't you?

(Testimony of Leo H. Martin.)

A. Yes, I knew the condition of it." (66-67).

The accident happened near the time clock. I had to go to the time clock at various times of the day to punch the clock, and I had been over the floor near the point where the accident happened on many occasions on each of the prior days. [39]. I had had plenty of opportunities to learn the condition of the floor. (67). I had gone over that part of the floor where this slope was located a good many times. (67). I had walked across it, and if I had glanced down at the floor I would have noticed the condition of the floor at that point. There was nothing concealed or hidden. The condition was right on the surface of the floor.

"Q. But, you could not see the surface was sloping?

A. No, sir.

Q. In other words, it did not slope enough so it was noticeable, is that right?

A. No, sir.

Q. That is your answer, it did not slope enough so it was noticeable?

A. No, sir, I said it sloped enough so you could see it.

Q. But, despite the fact you walked by them many times each day, you never noticed it sloped until after the accident, had you, is that right?

A. Well, before—just walking along there, you would notice it every time, but this cart

(Testimony of Leo H. Martin.)

at this time, and the wheels on it, you could not notice, or I did not notice it.

Q. Well then, your answer is, standing behind this wheel you forgot that slope, isn't that about it?

A. I was busy working. I was not looking for any slope.

Q. So, you did not stop to think about the slope that was there, isn't that about the size of it?

A. No, sir.

Q. You were not in a position from your place behind the wheels to see the floor, is that it?

A. No, sir.

Q. Well, was my statement correct, as I made it in my question? I did not quite understand your answer. As I stated the fact in my question, was I correct that you were behind the wheel, and [40] consequently could not see the part of the floor where the slope was, is that a correct statement of the fact?

A. Yes, sir, I was behind the wheel and could not see it.

Q. So, that you knew the slope was there, but you could not see it from the position in which you were standing when you were working on the wheels at this time, that is correct, is it not?

A. Yes, sir." (69).

(Testimony of Leo H. Martin.)

The diameter of the trailer wheels loaded on the truck was about four feet. (69). The diameter of the front wheels of the truck itself was about six inches. (69).

I could not say exactly how long the slope was that I have described. I would say it was between two and a half and three feet. (70). The planks of the floor were laying endways. That is, in the direction in which the truck was moving, so that the butt end of the plank was up against the rail. The back end of the truck was on the level. I could not say that the front end was on the slope, but it was close to the slope. (70). The diameter of the back wheels of the truck are the same as the front.

The floor was of a material such that it became splintered, like fir lumber, from constant use. It was rough all over the surface. The joints were not even.

With the back end of the truck on the level when I pried it, it shot forward suddenly, but not from my prying. It was from the prying from the other bar, and a lot of other men pushing. The truck moved forward down to this track, whatever distance it was. (71-72). I could not say how deep the groove was along the track. It was not so very deep, just a little slope down to it. On the other side of the rail, the floor was a little bit higher than the level of the rail, be- [41] cause they just put planks in there, and did not hew them all, and made them a quarter of an inch higher than the rail. (72). The

(Testimony of Leo H. Martin.)

truck was then moving slowly enough so that it stopped of its own accord after it shot forward suddenly. (72).

I had worked on many occasions moving wheels on this truck, and pretty close to every time we moved it, the truck got stuck some place along the floor, and I knew when I began to move the truck that it was liable to stick somewhere along the floor, and that was the customary experience in using the truck, and I had all of that knowledge prior to the time that we started moving the truck at the time of the accident. (73). But I was never stuck in that particular place, but it had stuck in numerous other places along there. It stuck at numerous other places around the roundhouse floor, and I knew all of that before the accident happened on April 22, 1932. (72-73).

I am right handed but I use a tool left handed. (74-75).

As I was standing between the two wheels to pry before the truck moved, my back was towards the axle, on the right side of the axle, and I was standing there between the crowbar which I had in my hand and the axle. (77-78). As I was prying, I was in a position such as I now illustrate. (78). (Counsel for defendant placed pencils on the floor, as the witness took the position, at the forward end of the right foot and the left foot, respectively.) (78-79). It is pretty hard to tell how far my right foot was from the flange of the forward wheel at the time the

(Testimony of Leo H. Martin.)
truck started to move forward. (79). I could not state the distance because I just took the bar and shoved it in under, and was down and lifting on it. The bar was about six feet long. I do not know what part of the bar I had hold of, but it was probably back at least as far as the middle of the bar. (79). [42] I would not say that I had hold of the bar as far back as three feet. I just stuck it under there to pinch it ahead. I could not tell exactly how much of the bar was behind me and how much was between my hands and the flange. (80). I do not know how far my forward foot was from the flange, but I don't say that it was as close as six inches. I know my heel got under the rear wheel and got smashed. (80). (It was stipulated between counsel that the distance between the toes of his right foot and his left foot as the witness took his position for illustrative purposes was twentyfour inches.) (81). The distance between the wheels to the outside of the flange is four feet eight and a half inches. The flanges are all of an inch thick, so that the distance between the wheels inside the flange would be about four feet six inches. (81-82). At a former trial of this case, I testified that the distance between my right toes and my left toes as I stood to pry, was about twentytwo inches. (82-83). At that former trial, I testified that my rear foot, as I stood to pry, was pretty close to four feet from the flange of the forward wheel. (83-84). As I stood in position to pry, the bar extended out to the

(Testimony of Leo H. Martin.)

outer edge of the rear wheel. (84). The trailer wheels were about four feet in diameter. The axle of the trailer wheels was about nine inches, and the channel iron is about ten or twelve inches wide. I could not say how far I stood from the center of the axle. I was right along side of it, and my back was pretty close to the axle. I took hold of the bar in a position so that I could exert force to move the truck forward, and I wanted to be able to exert considerable force with the crowbar. (85). I cannot say how far back from the front wheel my hands were on the bar. (85). They were in a position just like you would take a bar and get back up between two wheels like that and shove it [43] under there, and you could not tell exactly how far it would be. (86). At that time I knew that other members of the crew were pushing on the wheels to move it off this place, and I knew that men were in back of me pushing to move it forward, and I knew that when I took my position with the bar, and I expected the wheels to be moved forward to a certain extent, and I knew that that was what the other members of the crew were trying to do, and it did not surprise me at all when that back wheel moved forward in my direction. (86).

"Q. . . . When the truck moved forward, it moved some distance before it came to a stop, did it not?

A. It moved some farther than it ever had before when I pinched it, yes, sir." (86-87).

(Testimony of Leo H. Martin.)

I fell forward after I got my foot caught. (87). I did not see the man use the bar at the back end, but when I raised up, he had the bar in his hand and was going to put it under to pinch it again to get it out of this hole. I did not know ahead of time that Pickett had a bar. (87). I knew some men were behind trying to push it. I did not know beforehand that Pickett had a bar. I knew he went after one. (87). There was a man on the left side of the axle at the front wheel, and he was supposed to be pushing, and I knew that was what he was there for, and before the truck stalled there had been a man pushing at that point, that is, on the front wheel on the left side of the axle. While I was using the bar, he was still there. Whether he was pushing or not, but he was supposed to be pushing. There were seven or eight men working on the job. I could not tell how many men were on the back, but so far as I knew, everybody was on the job doing as they were supposed to do, and the job of everyone was to move the truck forward. (89). [44]

The only instructions that Morrison gave me were before I got the bar, and after I got the bar, I tried at least twice to pry from a position different from that which I used at the time of the accident. Morrison did not tell me about changing positions. He told me to pry, to put it under and pry. (89).

(Testimony of Leo H. Martin.)

"Q. I say, no one told you how to place yourself to get the best leverage, and the selection of the place where you did go to, was your own idea, wasn't it?

A. Well, it was where I had to get to move it.

Q. Well, no one told you. That is what you decided, wasn't it?

A. Well, he told me to put it under the wheel or under the front end and raise it up.

Q. And that is all he did tell you, so the selection of the precise place, the exact place was your own idea, wasn't it?

A. Well, it had to be, to move it." (89-90).

At a former trial, I testified as follows:

"Q. And did you know by your experience, or otherwise, that there was danger to you in working in the position in which you then assumed?

A. I had worked around it before different times. I never happened to get caught in there. Never was in the first place, I shoved the bar under there when I was standing out a ways from it, but the bar slipped off twice, I think, and then I had my back to this axle, and just moved over enough so I could get under. I did not realize really how close I was to the wheel—how close to the journal, until it hit me." (89-90).

(Testimony of Leo H. Martin.)

At a former trial, I testified that the truck never did make a trip unless it got hung up at some place or other. (91).

> "Q. Before this accident happened, you knew that the cart was in the condition in which it was, at the time of the accident, didn't you? You knew that it bent when a heavy load was put on it, as you have described it?
>
> A. Well, I knew it had before. I don't know—I never paid any particular attention to it at [45] that time.
>
> Q. But, on previous occasions you had seen it act just that same way, had you not?
>
> A. Yes, sir, in some places." (91-92).

Redirect Examination.

While I was prying with the crowbar at the time of the injury, I was not able to see the condition of the floor around me. I did not know that the truck was on the slope at the time. I found that out when it started to move. When the truck started, it moved probably two and a half or three feet before it came to a stop. At the time the car moved, I knew that there had been a good many men pushing on it with their hands. (93). I did not notice any signals given by the foreman at the time the truck started. I could not say how fast it traveled. It just went right down to this track, and before, why it would just move what you pinched, until you got

(Testimony of Leo H. Martin.)

it off, and you could push it without any pinching of the bar. (94).

Defendant's Exhibits A-1, 2, 3 and 4 do not show the condition of the truck as it was at the time of the injury. It is reinforced in different places. It was reinforced where it was cut out. Since I was injured, it has been straightened out and reinforced till you would not know it was the same cart if you never saw it before, that is setting up as straight as it is there. It was reinforced by electric welding. I could not tell the dimensions of the reinforcement. I do not know when the repairs were made after my accident. (95). It was the right side of the skeleton truck which was sprung. I could not say how far it was sprung. It just bent down towards the floor. If it had been straight up, like it is now, there would not have been near as much danger of [46] getting hung up on anything. (95).

Recross Examination.

By electric welding there is no more material in it after you get through with it than there was before, but just substituting something, but it would strengthen it. There is no more material in the channel iron now than when it was new, but there is some on it. (96). Defendant's Exhibits A-1 and A-2 show a pair of wheels of the same kind as were on the truck at the time of the accident, and they are not solid disc wheels. They are spoke wheels. (96). Standing in a position two or three

feet from the wheel, there is no reason why you cannot see the floor on the other side of the wheel, if you were standing there looking at it. If you were working there, you might not be looking around. (96-97).

> "Q. In other words, you might not be thinking about what was going on at the particular moment?
>
> A. Well, you would be thinking what you were doing, yourself." (97).

W. E. McCARTY, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination.

My name is W. E. McCarty. I live at Battleground, Clarke County, Washington. I am an electric welder. I was employed by the S. P. & S. in the roundhouse at Vancouver from September 12, 1923, until November 30, 1932. (119). I am familiar with the floor in the roundhouse at Vancouver. The general condition of the floor is practically the same all the time, so far as that goes. It is a plank floor and wears down fast, [47] hauling heavy loads over it all the time, and it is rough. (119-120).

The truck shown in defendant's Exhibits A-1, 2, 3 and 4, was bent several times and had been straightened out. I do not recall whether I assisted in making it. (120). I do not know for sure what purpose the truck was built for. I am fa-

(Testimony of W. E. McCarty.)

miliar with passenger locomotives used by the S. P. & S. They first acquired wheels of the sort shown in defendant's Exhibits A-1 and A-2—I could not say definitely, but it was in 1927 or 1928 when they installed the boosters on six hundred Class locomotives. I do not think that the S. P. & S. had that kind of wheels on its locomotives when this truck was built. (120-1). Immediately after it was built they hauled engine truck wheels on it. (121).

> "Q. What was the size and weight of those wheels as compared with the wheels shown in Defendant's Exhibits A-1 and A-2?
> . . . "

(At this point defendant objected, the objection was overruled and an exception allowed, as indicated in this bill of exceptions.)

> "A. Well, I have to just guess that. The pony truck wheel, I judge probably weigh, axle and all, wouldn't weigh over fifteen hundred pounds.
> Q. And how long was it after that truck was built before they started carrying the wheels shown in the exhibits referred to?
> A. Well——" (121).

(At this point defendant made the same objection, which was overruled, and an exception taken, as hereinbefore noted.)

(Testimony of W. E. McCarty.)

"Q. How long did the S. P. & S. have that skeleton truck before wheels of that type were carried upon it?

A. I couldn't state definitely that. [48]

Q. Well, approximately.

A. Well, that truck, if I remember right, was built when Mills came in there as foreman—general foreman. I couldn't state just when that was.

Q. Could you give us the year?

A. It might have been a year, I don't know."

I would not state the interval between the time of the building of the truck and the time when the railroad started carrying these big wheels on it. (122). I would say maybe six months or a year. It might have been a year and it might not have been. (123).

Cross Examination.

When wheels weighing four thousand pounds were placed on the truck, there is a tendency to spring down on the forward wheel with the weight in there. (124). The condition of the floor is not always exactly the same. They repaired the floor several times by getting down and breaking a plank out, but the general condition, it was rough, from 1923 to 1932. (125). The heavy trailer wheels such as are shown in the photographs came into use along about 1927 or 1928, and after that time the

truck had been used on many previous occasions for moving wheels of that type during a four or five year period prior to April 1932. (125). And while working in the shop, I have seen it used on many occasions for moving trailer wheels of just this same type. (125-126).

Redirect Examination.

Sometimes to move the trailer wheels, they would take the wheels in the drop pit and run them out through the roundhouse door on a track out in front of the roundhouse door, and run them back into the machine shop. (126). [49]

ROY BUTTNER, a witness called on behalf of plaintiff, testified as follows:

Direct Examination.

My name is Roy Buttner. I live in Vancouver. I was employed by the S. P. & S. from 1929 to 1932. I am very familiar with the condition of the floor in the roundhouse, and was familiar with its condition in April of 1932, at which time I was employed there. (127). I was on the laborers' crew as a sweeper, and it was part of my duty to sweep the floor of the roundhouse every day. The condition of the floor of the roundhouse was generally very rough. There were always depressions and elevations in it. Along the tracks they have metal plates that fit over the tracks so that the trucks can be put over them easily. (128). At the time

of the injury, the clearance of the truck unloaded was about an inch and a half. I cannot say what the clearance was when loaded with trailer wheels. It was very little. (129). The pictures of the truck shown in defendant's Exhibits A-1, 2, 3 and 4 were not taken at the location of the accident but were taken outside of the roundhouse. (129).

Cross Examination.

I was laid off by the S. P. & S. in February, 1932, and do not know what the conditions were in the roundhouse in April, 1932, after I was laid off. (129).

PRICE BUTTNER, a witness called on behalf of plaintiff, testified as follows:

Direct Examination.

My name is Price Buttner. I live at Vancouver, Washington. I was employed by the S. P. & S. as a laborer from 1929 [50] to 1932. (130).

I am familiar with the place in the roundhouse where the accident happened. Defendant's Exhibits A-1, 2, 3 and 4 were taken at a point three or four hundred feet from the place of the injury. I assisted in moving the truck and the wheels for the purpose of taking the pictures some time after the injury. (130-131). The clearance of the skeleton truck unloaded is about two inches, and when loaded with Trailer wheels, is about half an inch. (131-132). The pictures (defendant's Exhibits A-1 and A-2) do not reveal the correct clearance when loaded,

(Testimony of Price Buttner.)

because the floor shown in the picture is much better than the condition of the roundhouse floor. (132). When the pictures were taken we received instructions from Mr. Mills, the general foreman, to put the truck in the exact spot he wished it, with a knot under the front wheels which raised it half an inch, which would make the clearance a little better than an inch underneath the truck loaded. (132-133). I was one of a crew of about eight men engaged in moving the truck at the time of the injury. (133). At that time Harry Pickett had a bar under the back end of the truck and was prying. There were one or two men pushing from this back direction, helping hold the wheels on to keep them from rolling off. I was standing pushing on the rear of the back of the rear wheel on the right side. There were some men stationed on the left side between the two wheels. Martin, at the time of the accident, had his crowbar under the wheel, on the right hand side of the front wheel. Bill Morrison, the foreman, was standing right across on the left hand side, towards the fore part of the truck, about eight or nine feet from the flange of the wheels. (134). In that position he could see all members of the crew. I believe there was one man on the tongue. (135). [51]

On other occasions, two men were used on the tongue and they steered the truck. (135). On account of the weight, it is awfully hard for one man to handle the tongue alone over the rough

(Testimony of Price Buttner.)

floors, and on the tracks, and on most all occasions there were two men on the tongue to steer and the rest of us pushed. (136). To hold the wheels on the truck, most men kept hold of the wheels. There is a small flange that is cut in where the wheels can roll up, and the wheel rests on a small portion of the frame, which is all there is to keep the wheels on. (136). At the time of the accident, the truck hung up at this particular point because the floor is in bad condition and it was impossible to free the truck by pushing by hand. (136). The floor had been worn by heavy machinery going over it, and there is holes that is tore out. Where they sweep the floors, they sweep the slivers out, and that leaves the edge of the plank rotten underneath. At this particular place, the floor was both level and sloping. There was holes in the roundhouse wore deep enough to hold half a gallon of water, and it was on all angles, slanting, and some parts were spiked, and other parts were not. (137). At the particular point where the accident happened, there was quite a drop where the track ran through, and lumber was built up over it. The drop extended a foot and a half, sloping. On other occasions when the truck stuck, bars were used to free it by prying behind the truck, anywhere you could get hold of it. The bars were about six feet, some five feet long, and they have longer bars. The bars are of different shapes. They are made of steel. (138).

(Testimony of Price Buttner.)

On this particular occasion when the truck stuck, they gave us orders to all grab a hold and push while two men pried at the bars. (138). The foreman told Martin to grab a bar [52] and stick it under the front end. Martin was ordered to get a bar and place it in the position which he did. Martin was told to grab a bar. As near as I can recollect, the foreman said, "Martin, grab a bar and stick it under the front wheel." (139).

"Q. Did he or did he not indicate?——

A. He did.

Q. ——the precise place under the front wheel?

A. He did.

Q. With respect to the execution of that order, what did Leo do?

A. He did what he was ordered to." (139).

Wawell also went for a bar. I could not say whether he had returned before the accident happened. Pickett also had a bar. He was prying from the back end of the truck. (139-140). When Leo got the bar and started to pry, the truck, with the bars, and with some men pushing on it, gave way and caught Martin and threw him away from the truck. The truck kept going forward and Mr. Martin dropped down. Before the truck started, I was able to see Martin prying with the bar. (140). After Martin got the bar underneath, he was prying on the truck. Nothing unusual that I know of

(Testimony of Price Buttner.)

happened with reference to his prying before the truck was finally freed. After the truck was freed, it traveled about three feet before it stopped. When the truck started forward, the wheel caught Martin on the right hand side of the back wheel and twisted him around and threw him away from the truck. I asked Martin if he was hurt and he said "yes". I think Morrison asked him what was wrong. Morrison did not give any warning. (141). Pickett was the man with the bar behind. After Pickett took his position, nothing that I can remember was said by the foreman. Another method which was used in the roundhouse in moving trailer wheels other than the use of the skeleton truck, was as follows: [53]

When the wheels were lowered into the pit from underneath the locomotive, the train was backed up. Then the wheels can be rolled down the track, and there is a sidewalk and a large door on the passenger stall where the wheels can be rolled right out the door and put on another track. By following this track, two blocks, there is another track leads right into the lathe in the back shop where the wheels were going when the accident happened. (142). When the truck was stuck, and was freed with bars, it customarily traveled a short ways and again it would stick on the floor underneath the truck, and sometimes if they did not free it, it would move only three or four inches, and would travel, after being freed, the length of the pry un-

(Testimony of Price Buttner.)

derneath the wheel, just about the distance they had the bar to pry up on, and on the occasion in question, when Martin was hurt, it traveled about three feet. (143).

Cross Examination.

On this occasion, I was pushing behind because I had orders to, and I was pushing the truck to get it on its way to move it into the machine shop. That is what all of the crew were trying to do, to get it moving and keep it moving. That is the way it was usually done when the car stuck, we would all push on it and keep it moving; so that it was usual, after the truck was stuck on the floor, to keep it moving straight along if we could. (144).

"Q. But despite the fact that the customary way is for everybody to keep pushing on it and keep it moving, if they can, it usually stops in three inches. Did you ever push on it and keep it moving without stopping in three inches?

A. We did when the truck was going, and was not stuck.

. . . [54]

Q. I say, after a stop were you ever able, all pushing on it, to keep it moving?

A. Yes, sir.

Q. And that is what you were all trying to do, wasn't it, here?

A. Yes, sir. We were trying to get it to go again.

(Testimony of Price Buttner.)

Q. And you were trying to keep it moving into the machine shop?

A. Yes, sir." (145).

That is why I and the other members of the crew were pushing, trying to keep it going. (145). While Martin was in that vicinity with the bar in his hand, I cannot remember that he changed his position at all during the course of the work. (145-146). He was standing with his bar right under the wheel. I could not say whether his right hand was farther back on the bar. I do not remember whether his right foot or his left foot was forward. The bar was about six feet long. (146). I do not know the distance between the two trailer wheels. I do not know that the gauge of a standard railroad track is 56½ inches. I do not remember whether the distance between the wheels was more or less than the length of the bar. I cannot remember whether, as Martin stood with the bar, the bar extended out beyond the side of the rear wheel, or whether it was entirely inside between the two wheels, and I cannot say whether the bar was between Martin and the axle, or whether Martin was between the bar and the axle. (147). When the accident happened, he dropped out sideways. He did not drop forward and hit the front wheels with his hands. He just fell right to one side. (147). I could not say whether he fell clear to the floor. I was watching him enough to know that he was hurt, but I was not watching him

(Testimony of Price Buttner.)

carefully, but I saw that he fell to the side. I was attending [55] to the work and was not looking in his direction. I was right behind him pushing, but he was three feet in back of us when the wheel stopped. (148). When the wheel started, he was right in front of me and I was leaning down, with my hands out, pushing on the rear wheel, and on the other side of that rear wheel was Martin, about four feet ahead of me. (148). The wheels moved about three feet before stopping. (149).

> "Q. About three feet. All right, Martin was four feet ahead of you, and the wheels moved three feet, and you said when the thing was all over, Martin was three feet behind you?
>
> A. He was where I couldn't see him.
>
> Q. Didn't you see him fall out there?
>
> A. I was not watching him." (149).

I saw him drop out, knocked out. He went down to his knees. I said he went down on his knees. (149-150).

When the pictures, Defendant's Exhibits A-1, 2, 3 and 4, were taken, Mr. Mills did not tell the crew to get the rear wheels out of the puddle, out of the low spot in the floor. (Counsel was then referring to defendant's Exhibit A-1). (151). Morrison, at the time, was standing to the left hand side. There was some one pushing on that side between Martin and Morrison. I don't remember how he was stand-

(Testimony of Price Buttner.)
ing when Martin was doing the work. (151). I believe that he had his shoulder to the flange of the wheel, but I am not sure of that, and I cannot tell whether he had his shoulder or his hands up. I was not paying much attention to him. That is the way they generally push, and I do not know how he was standing. (152).

When Martin fell, I cannot say whether his hands hit the floor. (152). I attended an investigation relating to this accident on January 9, 1933. At that time questions were put to [56] me in the presence of a stenographer and my answers were taken down. Later I was shown a sheet of paper with questions and answers on it, and I signed it. The paper now shown me bears my signature, M. P. Buttner, and are the two pages of the statement which I signed. (153). (Document referred to was thereupon marked for identification.) I cannot remember whether at that time I was asked the question to which I answered as follows:

> "Q. Was there anybody present in charge of the work at the time of the accident, that you know of?
>
> A. At that time foreman Morrison was in charge of the job, and he had gone ahead to open a machine room door." (154).

At the time of the investigation, I was giving my best recollection of what happened at the time of the accident, and my recollection at that time was

(Testimony of Price Buttner.)

as good as it is today. I cannot remember whether I was then asked a question:

> "Q. Did anybody tell Martin to use the bar at the place he did use it?"

or whether I answered thereto:

> "A. No." (155).

At the time of the investigation, I was asked the question:

> "Q. You have had considerable experience in moving wheels, have you not?"

to which I answered:

> "A. I have had my share."

I remember that quite well. (155-156). At the time of the investigation, I was asked:

> "Q. What would be the proper manner to unloosen the wheel cart that was stuck the way this one was?"

to which I answered:

> "A. By prying from the rear of the cart." (156).

I do not remember whether, at the time of that investigation, [57] I was asked:

> "Q. Was there any reason why Martin couldn't have placed his bar at the rear of the truck at that time?"

(Testimony of Price Buttner.)

or whether I answered:

"A. No, there wasn't." (156).

I do not think that I was asked that question. This is the first time that I have seen the paper marked defendant's Exhibit A-5 to read it. After refreshing my recollection, I testify that I was not asked the question:

"Q. Was there any reason why Martin couldn't have placed his bar at the rear of the truck at that time?"

and I did not answer:

"A. No, there wasn't."

This paper, defendant's Exhibit A-5, was signed after the time that I was asked the questions. I do not remember whether a stenographer was present in the room at the time the questions were asked. I could not say how long after the questions were put that I signed the paper. I signed it at the rip track office. Mr. Mills asked me to sign the paper. (158). At the time I signed it, just Mills and I were present. I did not read it over at the time. I just signed any paper that Mr. Mills put in front of me. I did not look at the paper to see what I was signing. Defendant's Exhibit A-5 contains the papers that I signed at that time. (159). (Defendant's Exhibit A-5) reads as follows:

(Testimony of Price Buttner.)

"Statement of M. P. Buttner, Laborer, regarding the injury to L. H. Martin, Laborer, at Vancouver, April 22, 1932.

Vancouver, Jan. 9, 1933.

Stamped
Clark Co. Wn.
Case No. 14184
Defendant's
Identification No. 1 [58]
10-31-33 O. C.

Mr. J. D. Foley, Assistant Claim Agent, questioning.

Q. You were with Martin at the time he was injured?

A. I was.

Q. Just state what you were doing before the time of the accident.

A. We picked up a pair of trailer wheels at pit No. 10 and loaded them on a wheel cart to transport them to the machine shop. This wheel cart is constructed of steel and built very low to the ground so that the heavy wheels can be handled. There were five or six men on the ground at the time. The bottom of the wagon stuck about at the entrance to back shop but we released it by pushing without the aid of a bar. Then when we arrived at a point between pits 3 and 4 about in front of the clock, the bottom of the wheel cart came in contact with a high place in floor and we could not move it by

(Testimony of Price Buttner.)

pushing so Martin secured a bar and placed it under the forward trailer wheel on the right hand side of the cart and he used this bar to pry the wagon forward. His position at the end of the bar would place his foot almost against the rear trailer wheel and his prying and our combined pushing rolled the cart from where it was binding the rear trailer wheel and struck the man on the back of the left foot and ankle.

Q. Was there anybody present in charge of the work at the time of the accident that you know of?

A. Foreman Morrison was in charge of the job and he had gone ahead to open the machine room door.

Q. Did anybdy tell Martin to use the bar in the place where he did use it?

A. No.

Q. How long have you been working for the company?

A. A little better than two years.

Q. You have had considerable experience in moving wheels, have you not?

(end of page 1).

A. I have had my share.

Q. What would be the proper manner to unloosen a wheel cart that was stuck the way this one was? [59]

A. By prying from the rear of the cart.

(Testimony of Price Buttner.)

Q. Was there any reason why Martin could not have placed his bar at the rear of the truck at the time?

A. No, there wasn't.

Q. Was it anything unusual for the wheel truck to get stuck?

A. No. Every trip occurrence. The body of the truck is built so low it naturally springs down when loaded so there was only an inch clearance on the level and any raise in the floor over this would catch the bottom of the truck.

Q. Was there any extra heavy lifting on Martin's part to dislodge this cart from where it was stuck?

A. All the lifting that would be done would be done on the bar. I don't think it would be very hard lifting on it. Martin had no more than gotten his bar placed before the cart dislodged and moved forward.

Q. Was Martin thrown off balance or thrown down at the time that this happened?

A. No.

Q. Did he complain at the time of any injury to his back?

A. No.

Q. What did he say?

A. He was limping. He didn't help push it any further.

(Signed) M. P. Buttner."

Redirect Examination.

At the time the questions were put to me (in defendant's Exhibit A-5), I was at the rip track office near the roundhouse. I was ordered there by the general foreman and was there about ten minutes. I do not know the party who asked the questions. He was some one from Portland. His relation to the railroad was not disclosed to me. J. I. Mills, general foreman, [60] was also there. I don't remember whether there was a stenographer present. The paper was not written up at that time, but it was two or three weeks later that I signed it. The general foreman ordered us all to go down and sign it. (162). At the time he told us to go to the office and sign the paper they had written for us. There were about three in the office when I was there. They put the papers out in front of us to sign and we signed them. No one representing the company said anything to me at that time. I did not read it before signing. I was not asked to read it and it was not read to me, and I didn't know what the contents were. It was either sign it or lose our jobs. (163).

When the truck started forward and moved the distance which it did at the time of the accident, I was not surprised at the distance it traveled. (163).

At this point the plaintiff rested.

WILLIAM J. MORRISON, a witness called on behalf of defendant, testified as follows:

(Testimony of William J. Morrison.)

My name is William J. Morrison. I am employed by Spokane, Portland and Seattle Railway Company and have worked for the company since October 6, 1922. I work at the Vancouver roundhouse. In April, 1932, I was employed at the roundhouse as roundhouse foreman. (164). I had been roundhouse foreman since September 1, 1923, continuously up to and after April 22, 1932. As roundhouse foreman, I was familiar with the service to which engine No. 622 was put from time to time because I have the despatching of them. (165). In the spring of 1932, engine No. 622 was used mostly on passenger work, but it was available for other service in the spring of 1932. (165). I know of my own knowledge that before April 22, 1932, Engine No. [61] 622 had been used for service other than passenger train service and know that after that date it was used in service other than passenger train service. (165-166). It was used in local freight service and in stock service. Local freight service means a train that goes out to handle the local freight along the line between Vancouver and Wishram. Between Vancouver and Wishram the line of the S. P. & S. Railway does not lie outside of the state of Washington. (166). At Camas, Washington, is a paper mill and a woolen mill right at the edge of town. Prior to April 22, 1932, engine No. 622 had been used in freight service locally between Camas and Vancouver, Washington. We have used that engine to go up there when our local was

(Testimony of William J. Morrison.)
late to bring in freight from this paper mill when it was required. (166). Because of our local train being late, we would have to go out and bring in this freight in order to connect with the Great Northern connection in our yards for movement north to Seattle. The Great Northern line from Vancouver to Seattle does not lie outside of the state of Washington. (167).

The accident to Mr. Martin when he was assisting in moving the cart occurred about 9:30 in the morning. Engine No. 622 was in the roundhouse at the time. It was not in condition to perform transportation service because I had removed these trailer wheels to have the tires turned on them, and I had made a number of other repairs on the engine at that particular time that I was just completing. (167). At that time, when the trailer wheels were being moved, the engine had not been assigned to any further service. I usually make all my assignments for engines in the afternoon around 4:00 o'clock, because we have no engines running out of there for freight or passenger service that leave before 6:00 o'clock in the evening, and at 4:00 o'clock in the afternoon I get in touch with the [62] despatcher and see what trains he has lined up, and then the regular trains, I make the assignments for the engines and notify him at that time of what engines I am using. (168). Engine No. 622 was not assigned to any future service at the time that Martin was working, as described in his testimony,

(Testimony of William J. Morrison.)

and at that time I did not know what the next service of engine No. 622 would be. (168). I was the man in charge there that had the duty of assigning engines to particular work at that time. (168).

In the roundhouse there are 20 stalls, but not all of them have drop pits. One cannot very well remove a pair of wheels from an engine at any stall other than over a drop pit. At the time of the accident described by Martin, Engine No. 622 was at stall No. 10. It is a drop pit. (169).

We have a track outside of the roundhouse that runs around the house that we can take these wheels out over, and we cut them over on to the other track and we can get them around to the machine shop. On a number of occasions I have moved wheels from pit No. 10 to the machine shop over that track.

Out at the entrance of the machine room, I had a storage track and I would run the wheels out that way when I was not going to replace the same wheels, and then at the first available opportunity I would repair these trailers in the machine room and set them back out on this little track. When I did it that way I would use this track out through the outer end of the roundhouse, and I would bring my other wheels back the same way after I had removed them. That is, when I had available wheels to apply. (170). At the time these trailer wheels from No. 622 were removed, I was taking them to have them turned on account of shelling

(Testimony of William J. Morrison.)
of the tread of the tire, [63] and I intended, after turning, to reapply them to the same engine. (171). When I intended to reapply the wheels at completion of repairs, it was not a practice to use the track I referred to, because I lost too much time going around that way for one reason. I would have to take them back in the machine room, and usually I had rods and pistons and various other parts of machinery in the machines, and it would be in the way to go in with the trailers, so when I was reapplying them right back to the same engine I would use this cart that was built, and take them right down through the floor in the roundhouse. (171).

This cart was built in 1927. I had the idea—I thought we ought to have it. (171). I did not design the truck. At the time the cart was built, we had engines that were built in 1925 that had trailer wheels that were 600 pounds heavier and five inches bigger in diameter than these particular wheels that were under No. 622. This cart was built after 1925, when those larger trailer wheels were in use. In 1927, when the cart was built, it was used to handle trailer wheels, tender wheels, and engine truck wheels, and was used to handle wheels as large as those I spoke of, which weighed 600 pounds more than the trailer wheels on No. 622, right from the beginning. (172).

The wheels on No. 622 weighed 4700 pounds new, and the tires at that time were two and a half inches thick, so we turned an inch off the tread of the tire

(Testimony of William J. Morrison.)

and I would assume they would weigh 4350 pounds. The outside diameter was 48½ inches. The distance between the flanges was 53¼ inches. The axle was nine inches in diameter. The overall length of the axle from one end of the journal on the outside of the wheel to the other end of the journal on the outside of the other wheel was 84 inches. That is the extreme length of the axle. (173). [64] The channel iron on the truck was a 12 inch channel, with sides 3½ inches high. The metal in the bottom of the channel was 13/16 inch thick. (174). We used the truck continuously from the time it was built up until April, 1932, if we had to haul wheels. (174). There would be intervals of a week or two weeks when we would not use it at all, but whenever it was necessary to change wheels, we used the truck where we had to put the same wheels back again. (175). At the time of the accident, the truck was located right in front of the time clock at the first pit, that is, the first track entering the back end of the machine room. (175). Martin went to work there August 16, 1929, and worked up until April 22, 1932. He was employed as a laborer and engine wiper. I used him wiping engines, helping to haul material around from the roundhouse to the machine room, unloading sand cars, cleaning cars, and cleaning cabs of engines. Some of the work was heavy and some was light. I know that during the interval he was employed, he had assisted in moving the cart with wheels on it before

(Testimony of William J. Morrison.)
the time of the accident. (175). The floor of the roundhouse is four by twelve planking, and is placed parallel with the building in the runways and parallel to the pits along the stalls throughout the roundhouse except up at the boiler house where we used the dirt floor. The runway is the back end of the roundhouse, that is, back from the doors through which the engines come, and is the space between the head end of the engines and the back wall. (176). The planks paralleled the runway. The floor was rough. Where it had been spiked down the spikes showed in places and probably raised an eighth of an inch. The knots in the timber would show. It was splintered from hauling trucks over it, electric welders and heavy material. (176-177). Near the point where the accident happened, there are two tracks leading into the machine room, one [65] on each side of the wheel lathe. From the rail nearest the point where the truck stuck, back to the position of the truck as it was stuck, the planks had been cut off or tapered. There was about a half inch difference in the height of a 50 pound rail and a four-inch plank. A 50 pound rail measures three and a half inches high, and a four-inch plank four inches, and the planking was set right on to the ties, so the rail was half an inch lower than the plank floor, so they tapered off each plank half way across them so it would meet the same height of the rail. That is, half the width of the plank, so that the bevel would be six inches

(Testimony of William J. Morrison.)

wide on each plank on each side of the rail, and the groove thus formed would be approximately 14 inches clear across. (177-178). I was in the vicinity of the truck at the time of the accident; prior to the accident I had left the truck as it was moving along and had gone ahead to open those sliding doors into the machine room so that by the time they got down there we could roll the wheels off on to the track and roll them into the machine room and pick them up with the hoist and put them in the machine, and I had gone ahead to open the doors. As I got the doors open and came back, the truck was still moving forward, in fact I no more than got the doors open when they were practically right behind it with the truck. (178). I did not see the accident that Martin tells about. (178-179). I did not give any order to Martin to get a bar and move the truck, and I did not give any order to any of the crew working on the truck to get a bar. (179). I have seen bars used on occasions in moving the truck, not very often. If they all pull and push, it is not necessary, but I have seen bars used on other occasions. It was not necessary to give orders with respect to the use of bars. The work Martin was doing was not different generally than that usually done by him around the roundhouse. [66] He helped on trailers, engine trucks, and tank wheels, just the same as the rest of them when it was required. (179). When I got back to the truck after opening the doors, Martin was still working. The

(Testimony of William J. Morrison.)
wheels were then taken to this track, rolled off the wagon into the machine room, and raised up with the hoist and put in the lathe. Martin continued to work in that operation. The first I noticed of any injury to Martin was when they were raising the wheels up, Martin was limping around and I asked him what was the matter and he said he hurt his foot, his left foot. (180). Martin was carried on the payroll as a laborer. (180).

Cross Examination.

I started in the railroad business in 1910 with the Great Northern, and have been at it continuously since except the time during the war. (180). I started with the S. P. & S. in 1922 as a machinist in the Vancouver roundhouse. I fixed 1927 as the time when the truck was built because I took care of all the wheels there and I know when this truck was built. I havent the record with me, but I have a record of it. It was made in the shops in February of 1927. The general foreman and I figured out the design. I knew what I wanted and I asked him to build it for me. (181). From my experience, and the general foreman's experience, we both know the stress of any metals required or we couldn't very well hold the positions that we have. (181-182). We tested it with a load consisting of wheels weighing 5100 pounds when it was first built. The truck did give some, it gave way five-eighths of an inch. This was the only truck of that type we

(Testimony of William J. Morrison.)

had at the roundhouse, and prior to February, 1927, we had no truck. We had a different arrangement for taking care [67] of wheels. (182). At the time of the injury in April, 1932, the truck was not sprung at all. The channel kept the wheels from rolling off and I did not have men to hold them on with their hands and they did not hold them on on this occasion. (183).

This engine was not used in local freight in April, 1932. It was used once in that service in the first part of May, 1932, and then used in the latter part of May. We made a couple of trips with it with stock trains. I could not tell how many times it was used in March, 1932, or in February, 1932, but I know that it was used whenever it was required. (184). The occasions when it was assigned to pick up local freight were emergencies only, that is all. I used to take the relief engine or the extra passenger engine I kept there. It was always kept ready to go, and I would use whichever one I had for emergency work. The general use to which it was put was hauling trains Nos. 1 and 2 between Portland and Spokane. (184). The repairs on this particular occasion were running repairs rather than general repairs. (184). I could have transported these wheels over a track rather than using the skeleton truck, but it would not necessarily be a safer way. I used the truck on this occasion because I had no extra pair of trailers for the engine. There were only five of

(Testimony of William J. Morrison.)
those engines and I just had five pairs of trailers, so that if I made any repairs on those trailers, I had to make them and put them back on the engine, and naturally I took them in the machine room the way I could get in there without delay to get the repairs made and get the wheels back to the engine. (185). To move the wheels on the track, I used eight men—six or eight. I used the same force on the truck. (185).

(Thereupon certain questions were propounded to the wit- [68] ness by the court, and he testified as follows:)

These trailer wheels were removed from the engine the morning of April 22, 1932, and I was taking them to the machine to have the tires turned. After they were taken out, they were put on the truck within fifteen minutes, long enough to back the engine off of the pit. We have what they call a "drop pit." We let the trailers down into the pit in the ground, and then raise them up in the air and roll them out to the edge of the pit, and this wagon was used. It would stand at the front end of the pit and we would roll them right on to the wagon. (186). It would take about five minutes from the time the engine wheels were taken from the engine until they were on the truck. I had the crew there before I dropped the trailers. (186-187). I used the same six or eight men to complete the movement to the machine shop, all except this man that

(Testimony of William J. Morrison.)

was injured. We have seven men assigned to the roundhouse who do nothing but sweep floors, wipe engines and clean cabs. (187). None of the seven men helped to take the trailer wheels off the engine —that was machinists' work. As soon as we had the engine away, I used the laborers to do the necessary labor work. They helped to get the wheels on the truck, and it was one continuous movement from the time they were putting it on the truck and moved the truck to the machine shop. (187). I would say it took about fifteen or eighteen minutes, and apparently during that movement plaintiff was hurt. (188).

(Thereupon further questions were asked of the witness by counsel for plaintiff.)

I could not say whether, in this local freight service, the cars had interstate bills of lading. I know that at the paper mill we had taken them up and brought them in here to go on the Great Northern to Seattle. Of course where they are [69] billed from there, I don't know. I could not say whether, on other occasions, there were cars being handled in interstate traffic. I presume there was freight in those cars with interstate bills of lading. (188).

Redirect Examination.

The paper and pulp cars referred to were billed for movement to Seattle. (188).

Recross Examination.

We ran to Camas just to get pulp cars at the paper mill whenever our westbound local would be late and these cars would not make the Great Northern connection. As Camas is only 15 miles from Vancouver, they would call a crew to go out and bring in this merchandise to put it on this Great Northern freight. (189).

DAVE REEDER, a witness called on behalf of defendant, testified as follows:

Direct Examination.

I work for the S. P. & S. in the roundhouse. I am carried on the payroll as a laborer. I was working in the crew with Mr. Martin in April, 1932. When we were in the neighborhood of the time clock, I was working on the right hand side of the wheel, right behind Martin. (190). He was working on the front wheel on the right side of the axle. I saw Martin pick up a bar. I did not hear the foreman direct him to get a bar, but he used it. I have worked on wheels on other occasions, while wheels were being moved on that truck. We used bars every [70] once in a while. As the truck was proceeding, it was stuck. I think Wagnell went for a bar, but I don't think he got back with it.

"Q. Did you see Mr. Martin get hurt?
A. No.
Q. Did he fall?
A. I didn't see him fall." (191).

(Testimony of Dave Reeder.)

But I did see him use a bar. I did not see him get his foot caught, and cannot say whether he did get his foot caught. (192). Other members of the crew were Pickett, Hodson, Wagnell, and one of the Buttner boys, I don't know which one. Pickett was right next to me in the middle of the back wheel. Hodson was working on the lefthand side of the back wheel. I don't know whether anybody was working on the front wheel on the left side of the axle. (192). I have seen Martin working, moving wheels with this truck, several times before the accident.

Cross Examination.

I have worked for the S. P. & S. since May 13, 1925, and am still working for them. I have worked on this truck many times. At the time of the injury, the truck was not sprung, that I know of. I think it was in perfect condition. I do not know of its being repaired shortly after the injury. (193).

I have discussed this case with the lawyer here, not very many times. (193-194). There was nothing other than the side of the channel iron to keep the wheels on the truck. The men did not have to hold the wheels to keep them from rolling off. There was no danger of the wheels rolling off. (194). On one occasion, the truck broke through the floor—the floor broke, not in this runway, but on the side road there where [71] there was a rotten place and they pieced the board over, and the wheel went through and hurt me. The floor had

been repaired before the Martin accident, but he was not hurt where I was. I don't know how long before Martin was hurt the floor was repaired. The whole floor was repaired throughout the roundhouse. (194). It was in pretty fair shape at the time Martin was hurt. (195).

> "Q. Now, isn't it a fact that the floor was repaired right after Mr. Martin was hurt, on account of his injury?
>
> . . . . . .
>
> Q. Now, isn't it a fact that this floor was repaired in this particular place right after this injury?
>
> . . . . . .
>
> A. I can't say whether it was right away. It was repaired. What I mean, where I was hurt, not where he was hurt." (195).

HARRY D. PICKETT, a witness called on behalf of defendant, testified as follows:

My name is Harry D. Pickett. I work for the S. P. & S. at Vancouver in the roundhouse, and was working there in April, 1932. I was one of the crew that was working to move the trailer wheels on the truck when Martin had some accident. (196). The truck stalled there in front of the tool room first, and then we pushed it off there, and then it stalled down there at the time clock. (196). In front of the tool room we pushed it off without a bar. When it stalled in front of the time clock,

(Testimony of Harry D. Pickett.)

Martin and Wagnell went to get a bar. Wagnell did not get back before the truck got moving. I did not hear Morrison or anybody else instruct Martin to get a bar. I was working right behind the hind axle, right on the back end of it. I was pushing on it. I did not have a bar. Nobody that I know [72] of had a bar at the rear end. (197).

Dave Reeder was back there with me. (197-198). I was trying to push the wheels on ahead. I did not see the accident. I did not see him get struck in the foot by the wheel. I did not see him fall down. He did not fall down that I know of. (198). After it was stalled in front of the time clock, Martin went down with us to the machine shop to the wheel lathe. He helped us put the wheels in the lathe, and I went back to work. I don't know after that whether Martin stayed or not. (198). I had worked with Martin before on this truck moving trailer wheels, I don't know just how many times, but every time, pretty near, that one was moved, the laborers had to move them, and we were all called to move them. (198). There was nothing unusual on this particular trip. We had to take them up through the aisle right along. Once in a while when taking them up there, they would stick on the floor and we had to loosen them with a bar, and sometimes we would not.

Cross Examination.

I am still working for the S. P. & S. I could not swear that Martin was not hurt on this occasion

when the truck stalled. I did not see it. I did not see the accident. (199).

ERWIN E. HODSON, a witness called on behalf of defendant, testified as follows:

My name is Erwin E. Hodson. I work for the S. P. & S. at the roundhouse in Vancouver, and was working there in April, 1932. I was one of the crew engaged in moving the pair of trailer wheels which have been referred to. I remember the truck with the wheels on it being stalled near the time clock. (200). [73] As near as I can remember, I was at the back of the truck on the left side pushing. I was attempting to move the trailer wheels to the machine shop and push the truck over. (201). I do not remember whether Martin got a bar. I do not remember instructions from any one telling him to get a bar. I did not see the truck strike him. Shortly afterwards he told me it had run on his heel, but I did not see it happen. I did not see him fall. I never saw him, really. I saw him afterwards when he was standing by the window, that is what attracted my attention to it. (201). It seems to me that he accompanied the truck down to the machine shop, but I couldn't guarantee it. (201-202). The runway is made of planks, and from use, the knots will stand up and the nails will stand up a little. It is passable. You can run trucks over it without dumping anything off, but it is a little rough and the splinters are up some. The condition of the floor in front of the time clock was about the same as in other parts of the runway.

Cross Examination.

I am still working for the company. (202).

At this point defendant rested.

Thereupon plaintiff called a witness in rebuttal.

ROY BUTTNER, who had previously testified, was called on behalf of plaintiff and testified as follows:

Direct Examination.

In my previous testimony I made an error which I desire to correct. I went to work in the S. P. & S. shop on May 14, 1929, and left the employ in February, 1933. (205). [74]

Thereupon the witness was asked:

> "Q. Do you know when the floor in front of the clock where this accident happened was repaired?"

to which the defendant objected, the objection was overruled, and an exception taken, as previously set forth, and the witness answered:

> "A. It was repaired some time after the accident." (206).

Cross Examination.

I do not know when, after the accident, it was repaired, but it wasn't as long as six months. (207).

PRICE BUTTNER, a witness who had previously testified, was called on behalf of plaintiff and testified in rebuttal as follows:

Direct Examination.

The witness was asked:

"Q. With reference to the occurrence of this accident, do you know when the floor at that point was repaired?"

to which the defendant objected, the objection was overruled, and an exception taken, and the witness answered as follows:

"A. A short time after the accident." (208).

Thereupon the plaintiff rested.

After the ruling of the court upon defendant's motion for dismissal upon the ground that the federal court had no jurisdiction to hear the case, and after the ruling of the court upon defendant's motion for a directed verdict, all as set forth hereinbefore, and after the argument of counsel to the jury, the court proceeded to instruct the jury. [75]

The following is a complete statement of all of the instructions given by the court to the jury:

"You have heard the testimony in the case and the arguments of the attorneys. The Court will instruct you upon the law of the case and you will then retire to consider the verdict to be returned.

You will take with you to the jury room the pleadings at the conclusion of the Court's instructions. These pleadings form the issues by the allegations therein made concerning the facts in the case—the facts of the case. You will have these pleadings with you in your jury room during your deliberations and can examine them if you find it necessary.

The first pleading filed is the plaintiff's complaint. In that he alleges his employment by the defendant and alleges the defendant was negligent in certain particulars in the method adopted in moving the trailer wheels; that it was further negligent in maintaining the platform or decking in an unsafe and wornout condition, and using a truck, the side of which was sprung and in failing to warn the plaintiff of the danger of the truck slipping forward, and in directing the plaintiff to work in the position where he was injured. He further alleges that such negligence was the proximate cause of his injury. In his complaint, plaintiff describes the nature of the injuries which he received and alleges the amount of damages resulting therefrom, for the recovery of which he sues.

To that complaint the defendant has filed an amended answer which you will also have in the jury room. In this answer, the defendant denies that it was negligent in any of the respects alleged by plaintiff; denies that such

negligence was the proximate cause of his injury, and denies the amount of the alleged damage. The defendant further sets out in its amended answer four separate affirmative defenses, the third and fourth of which the Court instructs you, as a matter of law, to disregard. In the first of these further separate affirmative defenses the defendant alleges that the plaintiff himself was negligent, particularly in using a bar, knowingly and unnecessarily placing himself in a dangerous position at a time when plaintiff knew that said wheels were to be moved.

The defendant further alleges that these negligent acts of plaintiff caused or contributed to cause the injuries, if any, which he sustained. [76]

In a further second affirmative separate defense, defendant alleges that at the time and place plaintiff sustained injuries, if any, of which he complains, plaintiff assumed the risk of such injuries, in that the dangers incident to the movement of said wheels, and the use of the bar in the manner adopted by plaintiff, were open and apparent and were known and appreciated by plaintiff, or should have been known and appreciated by him if he had used his ordinary powers of observation, and further alleges that the risks thus assumed caused or contributed to cause the injuries, if any, of which plaintiff now complains.

By plaintiff's reply, he denies these allegations contained in the first and second separate affirmative defenses.

You are now called upon to determine the issues made by these allegations and denials.

The burden rests upon the plaintiff of showing by a fair preponderance of the evidence, all of the material allegations of his complaint that are denied by the defendant.

There is, so far as the burden upon the plaintiff is concerned, in the matter of evidence, one exception to this. He alleges that the injury to his back, spine, and sacroiliac and pelvic regions is permanent, causing him to become nervous, unable to sleep at night, and to suffer considerable pain, and to be unable to follow his usual vocation.

Insofar as the permanency of his injuries are concerned, insofar as future pain and suffering and future disability are concerned, the burden rests upon the plaintiff of showing the same by evidence to a reasonable certainty, rather than by a mere preponderance of the evidence.

Insofar as the allegation of contributory negligence is concerned, the burden rests upon the defendant of showing by a fair preponderance of the evidence that plaintiff was guilty of contributory negligence.

Concerning the burden as to the defense of assumption of risk, I will instruct you later.

The statute provides: Every common carrier by railroad while engaging in commerce between any of the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury—and this is the part that the Court wishes particularly to call to your attention—resulting in whole or in part [77] from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Well, now, the roundhouse, machine shop, and the decking of the platform about them, the Court instructs you are a part of the defendant's works, and that this truck was one of its appliances.

Passing to the allegations by plaintiff of defendant's negligence, you are instructed that an employer, in this case the defendant, is not bound to provide a place that is absolutely safe in all respects for the employee, nor is the employer bound to use the best and safest method of work or the best and safest appliances used therein. The employer is not an insurer of the safety of its employees. You are further instructed that you have no right to assume, merely because the plaintiff was injured, that the defendant was negligent.

It is, however, the duty of the employer to provide the employee, the plaintiff, with a reasonably safe place to work and to pursue a reasonably safe method in doing its work and to provide its employees with reasonably safe and suitable appliances with which to do the work required. This duty an employer is positively bound to perform in the first instance. He cannot be excused from its performance by intrusting it to another charged with the duty to make performance for him—for it, but who neglects to discharge that duty.

The employer is further under obligation to keep the place in which, and the appliances with which the employee is required to work, in a reasonably safe condition. If the defendant failed in any of these respects in the present case it was negligent.

Passing to the allegation of the answer that the plaintiff was guilty of contributory negligence, you are instructed that the plaintiff was under the duty of exercising ordinary care for his own safety. If he failed to exercise ordinary care for his own safety, and that failure was the proximate cause of his injury, he cannot recover full damages for such injury, even though the defendant was negligent, and even though its negligence was a proximate cause of such injury.

If the negligence on the part of the plaintiff was the sole cause of such injury, he of course

cannot recover in any amount. [78]

In the foregoing instructions the Court has used the word "negligence" and the expression "failure to exercise ordinary care".

Negligence as here used, means the want of ordinary care. This might be either in failing to do something that an ordinarily careful and prudent person would have done, or in doing something that an ordinarily careful and prudent person would not have done. Ordinary care is the care that an ordinarily careful and prudent person would exercise under the same circumstances, and should always be proportioned to the peril and danger reasonably to be apprehended from a want of proper prudence.

The defendant alleges that the plaintiff assumed the risk of his injury. The law relating to the assumption of risk applicable to this case is as follows:

The servant employee assumes all risks ordinarily and naturally incident to his employment, and all extraordinary risks which he knows and appreciates, but not such as are due to the negligence of the employer until the employee becomes aware of the negligent act and appreciates the danger arising out of it, unless the negligence and danger were alike so obvious that a person of ordinary prudence in his situation, making a reasonable use of his facilities, would have known of the condition

creating the danger and appreciated the danger.

"Obvious" as here used, means plainly apparent.

Regarding the burden of proof touching assumption of risk, the burden rests upon the plaintiff of showing that his injury was not caused by a danger ordinarily incident to the employment in which he was engaged.

The burden rests upon the defendant of showing that the plaintiff knew of the defendant's negligent acts and appreciated the danger arising out of such negligence on the part of the defendant, of which he complains or that they were so plain, obvious and apparent that the plaintiff should have known them and appreciated the danger arising from them.

Regarding plaintiff's allegation that defendant was negligent in failing to warn plaintiff of the danger he claims to have existed, the defendant would not have been negligent in that respect if the danger was so obvious and apparent that a person of ordinary prudence, in the situation in which plaintiff was making a reasonable use of his [79] faculties, would have known of the conditions and appreciated the danger arising from them.

In the course of these instructions the Court has used the expression "proximate cause". Proximate cause is the moving, efficient cause; that cause which, moving in direct sequence,

uninterrupted by any new and efficient cause, produced a result, and without which it would not have occurred.

The Court has used the expression "preponderance of the evidence". A preponderance of the evidence is the greater weight of evidence. That evidence preponderates which is of such a nature as to create and induce a belief in the mind. Where there is a dispute in the evidence, that evidence preponderates which creates and induces a belief in the mind, in spite of opposing evidence.

In taking up the issues submitted to you, the law does not require you to take them up in any particular order, but it would appear logical to approach them in the following order:

First, has the plaintiff shown by a fair preponderance of the evidence that his injury was caused in the way he says it was caused. That is, by being struck and thrown by the rear trailer wheel. If he has failed to show that by a fair preponderance of the evidence, there would not be any occasion for you to consider the case further. You should stop in your consideration of it and return a verdict for the defendant, for in such case the plaintiff would have failed in his proof.

If, however, he has sustained the burden of proof upon this question and shown, by a fair preponderance of the evidence, that his injury

was caused in the manner in which he states, you would next consider this defense of the assumption of risk.

Has the defendant shown by a fair preponderance of the evidence that plaintiff's injury was caused by one or more of the dangers ordinarily incident to his employment, or that the alleged negligent acts of the defendant, at the time and place plaintiff claims to have been injured, were known to the plaintiff and the danger arising from them appreciated by him, or, has it been shown—so shown by a fair preponderance of the evidence that they were so apparent and obvious that plaintiff, making the use of his faculties that an ordinarily careful and prudent man in his situation would have made, would have known of them and appreciated the danger arising from them? If the defendant has, by a fair preponderance of the evidence shown either you would again stop in your consideration of the [80] case and return a verdict for the defendant, because the defendant would have made out its defense of the assumption of risk which would defeat plaintiff's recovery.

If, however, there is no fair preponderance of the evidence so showing, you would then consider whether the plaintiff had shown by a fair preponderance of the evidence that the defendant was negligent in one or more of the respects alleged by him. If the plaintiff has

failed to so show by a fair preponderance of the evidence, you should stop in your deliberations and return a verdict for the defendant because the plaintiff would have failed in his proof.

If, however, he has sustained this burden, you would next consider whether the plaintiff has shown by a fair preponderance of the evidence that at least one of the acts of negligence with which he charges the defendant was the proximate cause of his injury. If plaintiff has failed to so show by a fair preponderance of the evidence, he is not entitled to recover.

If, however, you decide the foregoing issues in plaintiff's favor, you would next consider the damage caused plaintiff by the injuries proximately caused by that negligence of which plaintiff has accused the defendant. If you find that such negligence on the part of the defendant was the sole cause of plaintiff's injury, you should award plaintiff such sum of money as damages as will fairly and justly compensate him for such injuries described by him in his complaint as were proximately caused by defendant's negligence. In so doing, you should take into consideration the nature and character of plaintiff's injury, whether it is permanent or temporary; wages lost by him on account of such injury; any pain and suffering he may have endured; and from all these matters—may have endured, or may hereafter

endure. That is wrong—any pain and suffering he has endured, and will hereafter endure, and from all of these matters determine as best you can what sum of money in your best judgment, un-influenced by sympathy or prejudice, will fairly and justly compensate plaintiff for such injury, not exceeding of course the amount asked in the complaint.

Passing to the issue of plaintiff's contributory negligence, as already in effect stated—if the defendant has failed to show by a fair preponderance of the evidence, contributory negligence on the part of the plaintiff, then the plaintiff would be entitled to recover his full damages, unless he had assumed the risk as explained to you.

If, however, the defendant has shown by a fair preponderance of the evidence, negligence on the part [81] of the plaintiff in one or more of the respects which the defendant alleges, and has shown by a fair preponderance of the evidence that such negligence on the part of the plaintiff was a proximate cause of his injury, the plaintiff would not be entitled to recover his full damage for the law is that contributory negligence does not bar recovery but that his damage resulting from injury caused by concurring negligence on the part of himself and employer is diminished in proportion to the negligence attributable to the

employee. If the employee's—servant's negligence is great in comparison to that of the employer, then his right of recovery—the amount he is entitled to recover on account of his injury—is accordingly diminished. If his negligence is slight in comparison with that of his employer, then his right of recovery is slightly diminished.

As an illustration, if you were able to say from the evidence that half of the negligence causing his injury was the servant's, and half of it was the employer's, why, the employee would only be entitled to recover half of his damage. You should not conclude because of this illustration that the Court is in any way indicating an amount that should be allowed. If the plaintiff's negligence contributed to cause the accident to the extent of one-third of the entire negligence, then plaintiff's damages would be reduced by one-third. If to the extent of two-thirds, then his damages would be reduced by two-thirds. But, if as already stated, his, the plaintiff's negligence was alone the sole cause of the accident, then of course that would bar his right to any recovery and your verdict should be in favor of the defendant.

You are in this case as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every question of fact in the case, the weight of the evidence and the credibility of the witnesses.

Among the questions of fact in this case that you are called upon to determine, are:

What was the cause of any injury the plaintiff may have suffered?

Second, did the plaintiff assume the risk of such an injury?

Third, was the defendant guilty of negligence in any of the respects alleged by plaintiff?

Fourth, was that negligence one of the causes —one of the proximate causes of plaintiff's injury? [82]

Fifth, was the plaintiff himself guilty of contributory negligence?

Sixth, what was the nature of the injuries, if any, suffered by plaintiff which were proximately caused by defendant's negligence?

Seventh, what amount would fairly and justly compensate him therefor, and by what amount, if any, should that be reduced because of negligence on the plaintiff's part?

In weighing the evidence and measuring the credibility of the witnesses who have appeared before you and testified, their appearance, conduct, and demeanor in giving their testimony should be taken into account.

Take into account whether a particular witness appeared to you to be doing the best that witness could under the circumstances to fully and truthfully inform you as to those matters concerning which he testified.

Take into account whether a witness or witnesses appeared reluctnat or evasive, or by any conduct on their part led you to believe they were trying to keep from telling you something material to the case, or so distorted and twisted that which they did tell you as to be calculated to mislead you.

Take into account whether or not another witness or witnesses appeared too willing and repeatedly told you, or tried to tell you something about which they had not been asked.

Take into account the situation, in which each witness was placed as enabling that witness to know exactly what happened on a given occasion, as one witness might, because of his familiarity with conditions or relation to the occurrence, or his proximity thereto, be better enabled to observe what took place, to know what the situation was and conditions were, than another witness not having the same advantage or advantages.

Take into account whether the testimony of a witness appears probable in the light of the circumstances, or whether it appears unreasonable and unlikely.

Take into account whether the statements of a witness have at all times been consistent, and if inconsistent in any material matter, whether there has been a reasonable explanation shown for such inconsistency.

Take into account whether the testimony of

a witness has been corroborated where you would expect [83] it to be corroborated if true, or whether it has been contradicted by other evidence in the case.

Take into account the interest that any witness is shown to have in the case, whether it has been shown by the manner of the witness in giving his testimony, or by his relation to the case, those interested in it, or to the matters out of which it arose.

The plaintiff, having taken the stand and testified in his own behalf, you will apply to his testimony the same rules that you do to the testimony of other witnesses, including his natural interest in the result of the case.

Any verdict, in order to be received by the Court must be the unanimous verdict of the jury.

Anything further, gentlemen?''

The foregoing bill of exceptions is herewith lodged with the court and presented as defendant's bill of exceptions in this case.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER
& McCULLOCH
Attorneys for Defendant. [84]

[Title of Court and Cause.]

CERTIFICATE.

The matter of the settlement of the Bill of Exceptions herein in connection with the appeal of the defendant having been duly continued until this day, the parties having stipulated that with certain amendments the same may be allowed, and the Court being advised and finding the same proper and sufficient, with the exception of certain amendments on the Court's own motion made and embodied therein.

The Court certifies the foregoing, consisting of pages numbered 1 to 65, inclusive, and pages 1-a, includes a statement of all of the material evidence admitted, other than certain of the exhibits, and all material proceedings, rulings and exceptions taking place upon the trial and further certifies that the omitted exhibits were and are identified as Plaintiff's exhibits 1, 2 and 3 and Defendant's exhibits A-1, A-2, A-3 and A-4, of which exhibits Plaintiff's Exhibit 1 and Defendants exhibits A-1, A-2, A-3 and A-4 have, upon stipulation of the parties, been ordered forwarded by the Clerk of this Court to the Circuit Court of Appeals for the Ninth Circuit, the parties stipulating that Plaintiff's exhibits 2 and 3 are not necessary to the consideration of the points of law raised by the exceptions and the Court so finding, the same are ignored and neither are included in the Bill of Exceptions nor ordered transmitted to the Circuit Court of Appeals.

Done at Tacoma this 24th day of December, 1934.

EDWARD E. CUSHMAN
Judge [85]

United States of America
District of Oregon
County of Multnomah.—ss.

Due Service of the within Defendant's Bill of Exceptions is hereby accepted at Portland Oregon, this 13th day of November, 1934, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for Defendant.

WM. P. LORD (Signed)
of Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 24, 1934. [86]

[Title of Court and Cause.]

STIPULATION RELATING TO EXHIBITS.

It is hereby stipulated by and between the parties hereto through their respective attorneys that exhibits offered by the parties and received in evidence at the trial of the above entitled cause in this court, including the following:

Plaintiff's Exhibit 1—model of truck and wheels
Defendant's Exhibit A-1—photograph
Defendant's Exhibit A-2—photograph
Defendant's Exhibit A-3—photograph
Defendant's Exhibit A-4—photograph

which are a part of the record of the above entitled court in this case, shall be forwarded by the clerk of this court to the Circuit Court of Appeals for the Ninth Circuit, and shall be considered as a part of the record upon appeal to said Circuit Court of Appeals without being incorporated in the [87] bill of exceptions, and that an order may be made by the court to give effect to this stipulation.

And it is further stipulated that exhibits offered by plaintiff and received in evidence, consisting of x-ray plates and numbered respectively Plaintiff's Exhibits 2 and 3, shall not be forwarded to said Circuit Court of Appeals and are not necessary in the consideration of the points of law raised by the exceptions set forth in defendant's bill of exceptions.

Dated November 16th, 1934.

WM. P. LORD
HARRY ELLSWORTH FOSTER
Attorneys for Plaintiff.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant.

[Endorsed]: Filed Nov 19-1934 [88]

[Title of Court and Cause.]

ORDER RELATING TO EXHIBITS.

Based upon the stipulation of the parties hereto through their respective attorneys, it is hereby

ORDERED that exhibits offered by the parties and received in evidence at the trial of the above entitled case, including the following:

Plaintiff's Exhibit 1—model of truck and wheels
Defendant's Exhibit A-1—photograph
Defendant's Exhibit A-2—photograph
Defendant's Exhibit A-3—photograph
Defendant's Exhibit A-4—photograph

which are a part of the records of this court in this case, shall be forwarded by the clerk of this court to the Circuit Court of Appeals for the Ninth Circuit, and shall be considered as a part of the record upon appeal to said Circuit Court [89] of Appeals, without being incorporated in the bill of exceptions. And it is further

ORDERED that exhibits offered by the plaintiff and received in evidence at the trial of this case, consisting of ex-ray plates, and numbered respectively Plaintiff's Exhibits 2 and 3, shall not be forwarded to said Circuit Court of Appeals and plaintiff's attorneys so stipulating it be found that they are not necessary in the consideration of the points of law raised by the exceptions set forth in defendant's bill of exceptions.

Dated November 19th, 1934.

EDWARD E. CUSHMAN
Judge.

Approved as to form
WM. P. LORD

[Endorsed] : Filed Nov 19 - 1934 [90]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

TO THE HONORABLE EDWARD E. CUSHMAN, District Judge, and one of the judges of the above entitled court:

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, the defendant in the above entitled cause, feeling itself aggrieved by the judgment entered herein on the 13th day of November, 1934, in favor of the plaintiff and against defendant in the sum of $15,000, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and the whole thereof for the reasons set forth in the assignment of errors which is served and filed herewith; and said defendant prays that this petition for said appeal may be allowed, and that a transcript of the record and of all proceedings upon which said judgment is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and defendant further prays that an order may be made fixing the amount of security which defendant shall give and furnish upon the allowance of said appeal, and that upon

the giving of such [91] security, all further proceedings in this cause be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant.

[Endorsed] : Filed Dec 10, 1934 [92]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes defendant and files the following assignment of errors upon which it will rely upon the prosecution of this appeal in the above entitled cause from the judgment entered herein in favor of plaintiff and against the defendant on the 13th day of November, 1934.

I.

The above entitled court erred in denying defendant's motion, made at the opening of the trial of said case and before the statement of counsel and before any evidence was received, to dismiss the action upon the ground that the court had no jurisdiction.

II.

The above entitled court erred in denying defendant's motion, made at the trial after both parties had rested, to dismiss the case upon the ground that the court had no jurisdiction. [93]

III.

The above entitled court erred in overruling defendant's objection to the question propounded to witness W. E. McCARTY, a witness called and sworn on behalf of plaintiff, reading as follows:

> "Q. What was the size and weight of those wheels as compared with the wheels shown in defendant's Exhibits A-1 and A-2?"

IV.

The above entitled court erred in overruling defendant's objection to the question propounded to said witness W. E. McCARTY, reading as follows:

> "Q. And how long was it after that truck was built before they started carrying the wheels shown in the exhibits referred to?"

V.

The above entitled court erred in overruling defendant's objection to the question propounded to witness ROY BUTTNER, a witness called and sworn on behalf of plaintiff, reading as follows:

> "Q. Do you know when the floor in front of the clock where this accident happened was repaired?"

VI.

The above entitled court erred in overruling defendant's objection to the question propounded to witness PRICE BUTTNER, a witness called and sworn on behalf of plaintiff, reading as follows:

> "Q. With reference to the occurrence of this accident, do you know when the floor at that point was repaired?" [94]

VII.

The above entitled court erred in denying defendant's motion made at the close of all the evidence offered and received upon the trial of this action, and before the argument of counsel and the submission of the case to the jury, for an order directing the jury to return a verdict in favor of the defendant upon the ground that the plaintiff failed to sustain the burden of proof to show that any negligence of the defendant alleged in the complaint was the proximate cause of the accident complained of; that the evidence was insufficient to prove that the defendant was negligent in any of the respects charged in the plaintiff's complaint, and that it appeared affirmatively and as a matter of law that the injuries sustained by plaintiff, as alleged in the complaint, were proximately caused by risks of the employment which were assumed by the plaintiff.

VIII.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant

in writing prior to the arguments of counsel to the jury, reading as follows:

> "In his complaint, plaintiff charges that the defendant was negligent in that the method adopted by the defendant's foreman in transporting trailer wheels was not reasonably safe by reason of the condition of the decking or flooring of the roundhouse, and by reason of the sprung condition of the truck upon which the wheels were being moved. I instruct you that the evidence shows that plaintiff, before he began the particular task in which he was engaged at the time of his alleged injury, was aware of the condition of the flooring and was aware of the condition of the truck which caused the truck to stick or stall while being used in the transportation of trailer wheels. Likewise plaintiff knew, or in the exercise of his ordinary powers of observation, should have known of the dangers incident to the condition of the floor and the condition of the truck. Consequently, plaintiff, [95] when he began the task, assumed the risk of dangers arising from the condition of the floor and the condition of the truck. Since plaintiff assumed the risk of the dangers I have mentioned, he cannot recover from the defendant for injuries which he may have sustained on account of the condition of the floor and the condition of the truck. For those reasons, the allegations of negligence with respect to the condition of

the floor and the condition of the truck are withdrawn from your consideration and you cannot base recovery by the plaintiff on those allegations of negligence."

IX.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant in writing prior to the argument of counsel to the jury, reading as follows:

"One of the allegations of negligence set forth in plaintiff's complaint is, briefly, that the defendant's foreman should have directed four men to take crowbars and to place the ends of the crowbars, two at the side of the forward end of the truck and two at the rear of the truck, and should have directed two men to hold the tongue of the truck to guide it, and that the foreman should then have given a signal for all workmen to lift and pry in unison. I instruct you that the evidence discloses that plaintiff was fully aware of the manner in which the work was being done in order to move the truck forward after it had stalled just before the plaintiff was injured, as he alleges. The dangers inherent in the method of work as actually done were as apparent to plaintiff as to the defendant or any of its employees. For that reason it follows that the plaintiff assumed the risk of injuries, if any, which may have resulted from the fact

that the method then adopted was being used. For that reason you cannot base any recovery by plaintiff upon the charge of negligence with respect to the number of men working on the truck at the time of the alleged accident and the charge with respect to the number of crowbars then being used."

X.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant in writing [96] prior to the argument of counsel to the jury, reading as follows:

"The complaint alleges, as one charge of negligence, that the defendant was negligent and careless in maintaining the floor in an uneven and worn-out condition and in using a truck the side of which was sprung, as alleged in the complaint. I instruct you that the dangers inherent in the operation of movement of the trailer wheels by the truck over the floor in its then condition, and with the truck in its then condition, were as apparent to the plaintiff as to the defendant and for that reason plaintiff assumed the risk of injuries resulting from the movement of the truck in its then condition over the floor in its then condition. For that reason you cannot base any recovery by plaintiff on the allegation of negligence with respect to the condition of the floor and the condition of the truck."

XI.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant in writing prior to the argument of counsel to the jury, reading as follows:

> "The complaint alleges that the defendant was negligent in that the foreman, after adopting the method of movement of the truck in the manner alleged in the complaint, should have warned the plaintiff of the dangers of the truck moving forward as alleged in the complaint and should not have directed the plaintiff to work in the position described. I instruct you that the dangers inherent in the performance of the work as was done by the plaintiff after the truck had stopped were obvious to anyone using his ordinary powers of observation. For that reason there was no duty upon the defendant or its foreman to warn plaintiff of such dangers. There is no duty upon a master to warn a servant of dangers of the employment which are open and obvious and which should be discovered by the servant in the exercise of his ordinary powers of observation. Consequently that charge of negligence which I have just referred to is entirely withdrawn from your consideration and you are not permitted to base any recovery by the plaintiff on that charge of negligence." [97]

WHEREFORE defendant prays that said judgment heretofore and on the 13th day of November,

1934, entered in this action against the defendant and in favor of plaintiff, be reversed.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant.

[Endorsed] : Filed Dec 10 - 1934 [98]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The above named defendant, Spokane, Portland and Seattle Railway Company, having duly filed herein its petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein in favor of plaintiff and against defendant on November 13, 1934, and having duly filed its assignment of errors upon which it will rely upon said appeal,

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment entered in this action in favor of plaintiff and against defendant on November 13, 1934.

IT IS FURTHER ORDERED that the bond on appeal herein be fixed at the sum of $17,000, the same to act as a supersedeas bond and as a bond for costs and damages on appeal.

Dated December 10th, 1934.

EDWARD E. CUSHMAN
District Judge.

[Endorsed] Filed Dec 10 - 1934 [99]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation, as principal, and CONTINENTAL CASUALTY COMPANY, a corporation organized and existing under the laws of the state of Indiana, having an office in the state of Washington, and being duly authorized to transact business pursuant to the Act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereunder", as surety, are held and firmly bound unto LEO H. MARTIN in the full and just sum of $17,000, to be paid to said LEO H. MARTIN, his heirs, administrators, executors or assigns, to which payment, well and truly to be made, the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents. Upon condition, nevertheless, that

WHEREAS, the above named Spokane, Portland and Seattle Railway Company has appealed

to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment in favor of [100] the above named plaintiff, LEO H. MARTIN, made and entered on November 13, 1934, in the above entitled action by the District Court of the United States for the Western District of Washington, Southern Division, praying that said judgment may be reversed.

NOW, THEREFORE, the condition of this obligation is such that if the above named appellant shall prosecute this appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF, the said principal and the said surety have executed this bond the 10th day of December, 1934.

(Corporation Seal)

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

By: A. J. WITCHEL,

Secretary

As Principal

(Seal)

CONTINENTAL CASUALTY COMPANY

By: O. A. LYMAN,

Attorney-in-fact

By PARKER H. LYMAN,

Attorney-in-fact

As surety.

The foregoing bond is hereby approved as to form, amount, and sufficiency of surety.

EDWARD E. CUSHMAN
Judge of the United States District Court
for the Western District of Washington,
~~Southern Division.~~

[Endorsed]: Filed Dec 10 - 1934 [101]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please make up the transcript on appeal in the above entitled case, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, and you will please include in such transcript on appeal the following and no other papers and exhibits, to wit:

1. Complaint
2. Amended answer
3. Reply
4. Verdict
5. Judgment
6. Bill of exceptions
7. Certificate relating to bill of exceptions
8. Stipulation relating to exhibits
9. Order relating to exhibits
10. Petition for appeal and supersedeas
11. Assignment of errors

12. Order allowing appeal
13. Undertaking on appeal
14. Citation on appeal
15. Copy of this praecipe as served upon counsel.

Very respectfully yours,

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Spokane, Portland and Seattle Railway Company, defendant and appellant.

[Endorsed]: Filed Jan 4 - 1935 [102]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing 102 pages of typewritten record consisting of pages numbered from one to one hundred and two, both inclusive, are a full, true and correct copy of so much of the record, papers and proceedings in the case of Leo H. Martin, Plaintiff and Appellee vs Spokane, Portland and Seattle Railway Company, a corporation, defendant and appellant, cause No. 8354, in said Court, as required by praecipe

of counsel filed and of record in my office in said District at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I herewith attach and transmit the original citation in this cause.

I further certify, that under *seperate* cover I am forwarding to said Circuit Court of Appeals the original exhibits numbered as indicated in the stipulation and order relating to original exhibits, as filed in this cause and of record herein.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid by me on behalf of the appellant herein, for making of the appeal record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee	$ 5.00
Clerk's fee (Act Feb. 11, 1925) for making record 325 folios @ 15¢ per folio	48.75
Clerk's certificate to transcript of record	.50
Clerk's certificate to original exhibits	.50
Express charges on record to San Francisco Calif.	.60
Total	$55.35

I do further certify that the cost or record on appeal due this office amounting to $55.35 has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, in the Western District of Washington, this 15th day of January, 1935.

(Seal) EDGAR M. LAKIN, Clerk,
By E. W. PETTIT Deputy. [103]

[Title of Court and Cause.]

CITATION ON APPEAL.

TO LEO H. MARTIN, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to a notice of appeal filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Spokane, Portland and Seattle Railway Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment in said cause should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Tacoma in said district this 10th day of December, in the year of our Lord one thousand nine hundred and thirty-four.

EDWARD E. CUSHMAN
Judge. [104]

United States of America,
District of Oregon
County of Multnomah—ss.

Due service of the within Citation on Appeal is hereby accepted at Portland, Oregon, this 11th day of December, 1934, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for Defendant.

LORD
Of Attorneys for Plaintiff. [105]

[Endorsed]: Transcript of the Record. Filed January 18, 1935. Paul P. O'Brien, U. S. Circuit Court of Appeals for the Ninth Circuit.

No. 7745

In the

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation

Appellant

vs.

LEO H. MARTIN

Appellee

Brief of Appellant

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

CHARLES A. HART
J. W. QUICK
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & MCCULLOCH
Attorneys for Appellant and Defendant

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No. 7745

In the

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation

Appellant

vs.

LEO H. MARTIN

Appellee

Brief of Appellant

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

STATEMENT OF THE CASE

This case is before the court on appeal from a judgment on a verdict of a jury for appellee, in an action to recover for personal injuries.

Appellee was employed in appellant's roundhouse and shops at Vancouver, Washington. He

was injured while working as one of a crew moving a pair of locomotive trailer wheels from a locomotive in the roundhouse to a lathe in the adjoining machine shop.

Appellee bases his right to recover on the provisions of the Federal Employers' Liability Act (U. S. C. A. 49:51 *et seq.*) which relates to injuries to employees of common carriers engaged in interstate commerce. There is no ground of jurisdiction in a federal court other than that the cause "arises under . . . the laws of the United States" (Judicial Code, Sec. 24; U. S. C. A. 28:41).

In its answer, and at the trial, appellant asserted that the court had no jurisdiction because appellee, at the time of his accident was not engaged in interstate commerce within the meaning of the Federal Act and had no rights thereunder. The refusal of the trial court to dismiss the action for want of jurisdiction is now assigned as error.

On the merits, appellant asserts that the court erred in declining to direct a verdict in its favor on the ground that appellee's injuries resulted from the risks of employment assumed by him. If appellee had a cause of action under the Federal Act, giving the court jurisdiction, then appellee's assumption of risk, if established, was a complete defense. It will be argued that the facts as stated by appellee and his own witnesses, prove that the

njuries resulted directly from hazards of which ppellee was aware, and that the risks of injuries herefrom were assumed by him.

Other errors assigned include the refusal of he court to instruct the jury, as requested, to vithdraw from the jury's consideration particular harges of negligence.

SPECIFICATIONS OF ERROR

1. The trial court erred in denying appellant's notion, made at the opening of the trial and be- ore the statements of counsel to the jury, and efore any evidence was received, to dismiss the ction upon the ground that the court had no urisdiction. (R. pp. 20-21, 117).

2. The trial court erred in denying appellant's notion, made at the trial after both parties had ested, to dismiss the case upon the ground that he court had no jurisdiction. (R. pp. 25-26, 118).

3. The trial court erred in denying appellant's notion, made at the close of all the testimony eceived upon the trial of this case, for an order irecting the jury to return a verdict in favor of ppellant upon the ground, among other things, hat it appeared affirmatively and as a matter of aw that the injuries received by appellee, as al- eged in his complaint, were proximately caused

by risks of the employment which were assumed by appellee. (R., pp. 26-27, 119).

4. The trial court erred in refusing to give to the jury an instruction requested by appellant, as follows:

> "In his complaint, plaintiff charges that the defendant was negligent in that the method adopted by the defendant's foreman in transporting trailer wheels was not reasonably safe by reason of the condition of the decking or flooring of the roundhouse, and by reason of the sprung condition of the truck upon which the wheels were being moved. I instruct you that the evidence shows that plaintiff, before he began the particular task in which he was engaged at the time of his alleged injury, was aware of the condition of the flooring and was aware of the condition of the truck which caused the truck to stick or stall while being used in the transportation of trailer wheels. Likewise plaintiff knew, or in the exercise of his ordinary powers of observation, should have known of the dangers incident to the condition of the floor and the condition of the truck. Consequently, plaintiff, when he began the task, assumed the risk of dangers arising from the condition of the floor and the condition of the truck. Since plaintiff assumed the risk of the dangers I have mentioned, he cannot recover from the defendant for injuries which he may have sustained on account of

the condition of the floor and the condition of the truck. For those reasons, the allegations of negligence with respect to the condition of the floor and the condition of the truck are withdrawn from your consideration and you cannot base any recovery by the plaintiff on those allegations of negligence.

(R., pp. 29-30, 120).

5. The trial court erred in refusing to give to the jury an instruction requested by appellant as follows:

"One of the allegations of negligence set forth in plaintiff's complaint is, briefly, that the defendant's foreman should have directed four men to take crowbars and to place the ends of the crowbars, two at the side of the forward end of the truck and two at the rear of the truck, and should have directed two men to hold the tongue of the truck to guide it, and that the foreman should then have given a signal for all workmen to lift and pry in unison. I instruct you that the evidence discloses that plaintiff was fully aware of the manner in which the work was being done in order to move the truck forward after it had stalled just before the plaintiff was injured, as he alleges. The dangers inherent in the method of work as actually done were as apparent to plaintiff as to the defendant or any of its employees. For that reason it follows that the plaintiff assumed the risk of injuries, if any, which may

have resulted from the fact that the method then adopted was being used. For that reason you cannot base any recovery by plaintiff upon the charge of negligence with respect to the number of men working on the truck at the time of the alleged accident and the charge with respect to the number of crowbars then being used."

(R., pp. 30-31, 121)

6. The trial court erred in refusing to give to the jury an instruction requested by appellant as follows:

"The complaint alleges, as one charge of negligence, that the defendant was negligent and careless in maintaining the floor in an uneven and worn-out condition and in using a truck the side of which was sprung, as alleged in the complaint. I instruct you that the dangers inherent in the operation of movement of the trailer wheels by the truck over the floor in its then condition, and with the truck in its then condition, were as apparent to the plaintiff as to the defendant and for that reason plaintiff assumed the risk of injuries resulting from the movement of the truck in its then condition over the floor in its then condition. For that reason you cannot base any recovery by plaintiff on the allegation of negligence with respect to the condition of the floor and the condition of the truck."

(R., pp. 32, 122)

7. The trial court erred in refusing to give to the jury an instruction requested by appellant as follows:

"The complaint alleges that the defendant was negligent in that the foreman, after adopting the method of movement of the truck in the manner alleged in the complaint, should have warned the plaintiff of the dangers of the truck moving forward as alleged in the complaint and should not have directed the plaintiff to work in the position described. I instruct you that the dangers inherent in the performance of the work as was done by the plaintiff after the truck had stopped were obvious to anyone using his ordinary powers of observation. For that reason there was no duty upon the defendant or its foreman to warn plaintiff of such dangers. There is no duty upon a master to warn a servant of dangers of the employment which are open and obvious and which should be discovered by the servant in the exercise of his ordinary powers of observation. Consequently that charge of negligence which I have just referred to is entirely withdrawn from your consideration and you are not permitted to base any recovery by the plaintiff on that charge of negligence."

(R., pp. 33, 123).

ARGUMENT

I.

The Trial Court Should Have Dismissed the Action for Want of Jurisdiction.

The first two specifications of error raise the question of jurisdiction of the federal court under the Federal Employers' Liability Act.

The sole ground upon which appellee bases jurisdiction of the federal court is that the cause "arises under the Constitution or laws of the United States." (Judicial Code, Sec 24; U. S. C. A. 28:41). The complaint alleges that appellee was an employee of defendant and was engaged in interstate commerce at the time of the accident. He seeks to recover under the provisions of the Federal Employers' Liability Act. (U. S. C. A. 45:51 et seq.). No other basis of federal jurisdiction was suggested.

An employee of a common carrier can maintain an action under the Federal Employers' Liability Act only if he was engaged in interstate commerce at the time of his injury. If a plaintiff, by an action in a federal court, seeks to recover under the provisions of the Act, and if at any step in the pro-

ceedings it appears as a fact that at the time of the accident he was not engaged in interstate commerce, the court must dismiss the case, without prejudice, for want of jurisdiction. *Rice v. Baltimore & Ohio R. R. Co.*, 42 F. (2d) 387; (6th C. C. A.); *Steidle v. Reading Co.*, 24 F. (2d) 299; (3rd C. C. A.); *Chicago & Alton R. Co. v. Allen*, 249 Fed. 280; (7th C. C. A.); *Central R. of N. J. v. Colasurdo*, 192 Fed. 901, (2nd C. C. A.)

Appellant raised the jurisdictional question by its answer, wherein it was alleged that appellee was not engaged in interstate commerce at the time of the accident, by its motion to dismiss for want of jurisdiction, made at the trial before the jury was empaneled, and by a similar motion made at the close of the testimony. (R. pp.14, 20-22, 25-26).

Whether the trial court erred in denying these motions depends on the answer to the single question: Was appellee, at the time of the accident upon which he bases his claim for recovery, engaged in interstate commerce within the meaning of the Federal Employers' Liability Act?

The broad test to determine whether appellee was within the Act was stated by Mr. Justice Van

DeVanter, in *Shanks v. Delaware L. & W. R. Co.*, 239 U. S. 556, 36 S. Ct. 188, in the following language:

> ". . . the true test of employment in such commerce in the sense intended is, was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The Act has been before the federal and state courts in literally hundreds of cases which required the answer to the question whether an employee was so engaged. Although each case must be decided in the light of its particular facts (*New York Central & H. R. R. Co.v. Carr*, 238 U. S. 260, 35 S. Ct. 780), and although no precise test can be phrased which will permit an automatic answer in every situation (*Industrial Accident Commission v. Payne*, 259 U. S. 182, 42 S. Ct. 489), it is nevertheless true that in the long history of construction of the Act by the Supreme Court, very definite conclusions have been stated, and when the question has arisen in later cases involving similar facts, the same principles have been applied.

By that process, as we will show, the principles applicable to the facts in the present case have been fixed by the Supreme Court in a series of cases involving injuries to shop employees engaged

in repairs of locomotives. An application of the established rules to the present facts will compel the conclusion that appellee was not engaged in interstate commerce at the time of his alleged injuries.

At the time of the accident appellee was a member of a crew of seven or eight workmen engaged in moving a pair of locomotive trailer wheels from an engine at a drop pit in appellant's roundhouse to a lathe in the adjoining machine shop where the tires were to be turned. (R., pp. 42, 43, 81). It was contemplated that when the repairs on the wheels were completed, the wheels would be returned and replaced on the same locomotive. (R., pp. 81, 82).

Engine No. 622, from which the wheels were removed, was of a type suitable for passenger train service. The last transportation service in which it was used prior to the accident was on the morning of April 16, 1932, on an interstate passenger train. On arrival of that train at Vancouver, Washington, at 7:05 A. M. of April 16, the engine was detached from the train and moved to the roundhouse at that point. The next transportation service in which it was used was on the morning of April 23, to haul another interstate passenger train.

In the interval from the 16th to the 23rd, it was in the roundhouse undergoing repairs. (R., pp. 34, 35). The accident upon which plaintiff bases his action occurred on April 22. (R., pp. 5-7).

At the time of its arrival at Vancouver, the morning of the 16th, it was reported by the engineer who had been operating it on its last trip that "lower rail of engine frame broken left side just over engine truck wheel." That defect was of such a nature that the engine was not in a safe condition for further service and would not be until the defect had been repaired. (R., pp. 36, 37).

While in the roundhouse numerous repairs were made, including repair of the engine frame, a boiler wash, removal of trailer wheels for turning "on account of shelling", calking of steam leak and replacement of brick on the back wall, and some twenty other repairs of varying importance. Upon removal of the trailer wheels, which appellee was assisting in moving at the time of his alleged injuries, the locomotive was not in condition for use in any transportation service. (R., pp. 37-39).

Engine No. 622 was one of a group owned by appellant and used in passenger service, and, when in service, was customarily used on passenger trains

Nos. 1 and 2 between Spokane, Washington, and Portland, Oregon. A normal cycle of use of an engine engaged continuously in that service consumed parts of four days. If the engine had remained constantly in service on trains Nos. 1 and 2 during the time it was in the roundhouse, its schedule would have been as follows:

April 16—Taken off No. 1, westbound, at Vancouver, 7:05 A. M. and removed to roundhouse.

April 17—Leave roundhouse to haul No. 1, westbound, from Vancouver to Portland in the morning. Remain in Portland during the day. Leave Portland in the evening on No. 2, eastbound for Spokane.

April 18—Arrive Spokane in the morning. Remain in Spokane during the day. Leave Spokane in the evening on No. 1, a train scheduled for movement to Portland.

April 19—Arrive at Vancouver on No. 1 in the morning. Remove from train and replace by another locomotive. Take to roundhouse to begin another cycle.

April 20—Same service as 17th.

April 21—Same service as 18th.

April 22—Same service as 19th, completing a second cycle of use.

April 23—Same as 17th and 20th, to begin a third cycle of use.

(R., pp. 35-36).

Since the engine was actually in the roundhouse undergoing repairs from April 16 until the morning of the 23rd, when it was used to move No. 1 from Vancouver to Portland, it was out of all transportation service during a period in which it could otherwise have been used in two complete cycles of use —two round trips—between Portland, Oregon, and Spokane, Washington.

Although Engine No. 622 was "customarily used" on No. 1 and No. 2 interstate passenger trains (R., p. 35), its use in that service was not exclusive. Both before and after the date of appellee's accident, April 22, 1932, it was used in local freight service and stock service. Local freight service means "a train that goes out to handle the local freight along the line between Vancouver and Wishram", entirely within the State of Washington. Likewise, it was used locally between Vancouver and Camas, Washington. (R., p. 79). As stated by the roundhouse foreman:

> "We have used that engine to go up there (Camas) when our local was late to bring in freight from this paper mill when it was required. Because of our local train being late, we would have to go out and bring in this freight in order to connect with the Great Northern connection in our yards for move-

ment north to Seattle. The Great Northern line from Vancouver to Seattle does not lie outside of the State of Washington." (R., pp. 79-80).

The accident in this case occurred in the morning. (R., p. 80). Assignments for use of engines are made in the afternoon "around 4:00 o'clock". The engine was not assigned to any future service at the time appellee was working on the wheels, and at that time it was not known what the next service of the engine would be. (R., pp. 80-81).

It appears, therefore, that appellee was injured while working on the repair of a locomotive, out of transportation service and in the roundhouse; the engine was used most often in interstate service, but it was not exclusively so used; and at the time of the accident it was not determined whether its next transportation service would be in interstate or intrastate commerce. While so engaged, we submit, appellee was not engaged in interstate commerce within the meaning of the Federal Act, and cannot base a right to recover on the provisions of the Act.

This case is squarely within the principles stated by Mr. Justice Holmes in *Minneapolis & St. Louis Railroad Company v. Winters*, 242 U. S. 353,

37 S. Ct. 170. In that case plaintiff, an employee, was injured while repairing an engine. The engine had completed an interstate run before the accident, on October 18, and was next used after the accident on an interstate run on October 21. It was held that plaintiff, at the time of the accident, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The court said:

> " . . . An engine, as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

The *Winters* case is controlling and compels the conclusion that appellee in this case was not engaged in interstate commerce at the time of his injuries. The only fact shown in this case which was not present, or at least not discussed by the court, in the *Winters* case, is that the engine on

which appellee was working was "customarily" used in interstate service. But that fact does not change the result in this case. Indeed, it has been held that the fact that an engine is used *exclusively* in interstate commerce is not sufficient to bring an employee, engaged in its repair, within the Federal Act.

In the leading text on the subject, Roberts' Federal Liabilities of Carriers, the author states (Vol. 2, (2d Ed.), p. 1471):

> "However, the mere fact that an engine or car being repaired is, when in use, exclusively used in and devoted to interstate service, is not sufficient to bring under the act employees who participate in making such repairs. The impression to the contrary, obtained by some courts from the decision of the national Supreme Court in the Winters case, *ante*, was impliedly corrected by the memorandum opinion of that court in reversing a judgment of the Circuit Court of Appeals (Chicago, K. & S. Ry. Co. v. Kindlesparker, 234 Fed. 1, 6th C. C. A., reversed in a memorandum opinion on the authority of the Winters case, in 246 U. S. 657, 38 S. Ct. 425), but was definitely controverted in the later case of Industrial Accident Commission of California v. Payne (259 U. S. 182, 42 S. Ct. 489), . . ."

The case of *Chicago, K. & S. Ry. Co. v. Kindlesparker*, 234 Fed. 1, decided by the Circuit Court

of Appeals for the Sixth Circuit shortly before the decision in the *Winters* case, involved injuries to an employee while engaged in repairing a locomotive, which, when in service, was used indiscriminately in interstate and intrastate service. The lower court held that he was engaged in interstate commerce. The theory of the Circuit Court of Appeals was expressed in the following language:

> "The nature and effect of such service as this, both before and after the period of repair, now becomes still more evident. It was the same double service to which the road and yards and (when in use) all the engines of the company were alike constantly devoted; the strong tendency of the evidence is that the service was uniformly of such a nature that the engine in issue could not at any time have been placed in use at all (it certainly was not put in use) except in this double and unitary character of service—if indeed this was not true as to all the engines. The inevitable effect of this service was to impress every instrumentality, so used, with an interstate character, . . ."

The case was reversed by the Supreme Court on the authority of the *Winters* case. (246 U. S. 657; 38 S. Ct. 425).

In *Industrial Accident Commission v. Payne*, 259 U. S. 182, 42 S. Ct. 489, plaintiff was injured

while working in the shops on an engine "that had been employed in interstate commerce and which was destined to be so employed again." The engine was placed in the shop on December 19 for repairs which were expected to be completed on January 31. They were actually completed on February 25. The engine was given a trial run and was placed in interstate service on March 4. Plaintiff was injured on February 1. The court held that he was not engaged in interstate commerce at the time of his injury. The court said:

> ". . . But equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances, and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time, *or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations;* the relations of a workshop, its employments and employes having cause in the movements that constitute commerce but not being immediate to it.
>
> *"And it is this separation that gives character to the employment,* as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case." (Italics ours).

Further, the court disapproved the conclusion of the Circuit Court of Appeals in the *Kindlesparker* case, *supra,* that

> ". . . the test of the work was the instrument upon which it was performed, not the time of withdrawal of the instrument from use."

The latest decision of the United States Supreme Court applying the rule of the *Winters* case, and the most important for present purposes, as it is most nearly in point on its facts, is *New York, New Haven & Hartford Railroad Co. v. Bezue,* 284 U. S. 415, 52 S. Ct. 205. Plaintiff therein was employed by defendant as one of a gang of laborers in defendant's repair shops, and at the time of his injury was engaged in moving a pair of engine driver wheels from a lathe in the machine shop, where the journals of the wheels had been turned, to the engine pit in the roundhouse where the wheels were to be placed upon the engine. The engine came into the shop on August 23, and had been set aside for a customary boiler wash to be given to all engines every thirty days. Preparatory to the boiler wash an inspection was made and orders issued for certain work which included

> ". . . the removal of the main driving wheels and shifting them to the hoist shop so that the

> journal might be turned, the transfer of several parts to the machine shop, the separation of the jacket from the fire box, the replacement of some four hundred seventeen leaking bolts, the renewal of bushings, and other items requiring skilled labor. The fire was dumped, the main driving wheels and other portions needing attention were removed, and the engine was left inert and incapable of locomotion."

The repairs consumed twelve days. The plaintiff was injured on September 2, the ninth day after the engine had come into the shop. Plaintiff sought to recover under the Federal Employers' Liability Act. The state court of New York held that the plaintiff was engaged in interstate commerce at the time of his injuries upon the ground that plaintiff was engaged in plant service and worked indiscriminately upon engines used in interstate and intrastate commerce. Judgment for the plaintiff was reversed by the Supreme Court. The Supreme Court applied the rule of the *Winters* case and of *Industrial Accident Commission v. Payne, supra* (cited in the decision in the *Bezue* case as *Industrial Accident Commission v. Davis*). Mr. Justice Roberts, in delivering the opinion of the Court, said:

> ". . . Under the circumstances of this case, whether respondent is within the act must be

decided, not by reference to the kind of plant in which he worked, or the character of labor he usually performed, *but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it.* The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principal announced in Industrial Accident Comm. v. Davis (259 U. S. 182, 42 S. Ct. 489), and Minneapolis & St. Louis R. Co. v. Winters, . . . stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as New York Cent. R. Co. v. Marcone, 281 U. S. 345, 50 S. Ct. 294, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run.

"Respondent endeavors to support the claim that here the instrumentality had not been taken out of interstate commerce, by reference to the practice of petitioner, which is that work, sometimes greater and often less in amount than in this case, is done at Maybrook in connection with the monthly boiler wash; whereas, after a locomotive has run thirty-five thousand miles, or eighteen months, it is marked for out of service repairs, and is sent to petitioner's general repair shop at Readville, Mass. The argument is that the railroad company thus recognizes that such work as is done at Maybrook in conjunction with boiler washing is incidental and does not take the engine out of service.

"We do not think this custom warrants a

> disregard of the proved facts, and the adoption of an artificial classification of the locomotive as one in service at the time of respondent's injury. . . ." (Italics ours).

The facts in the *Bezue* case are surprisingly similar to those before the court. There, as here, the repairs performed while the engine was in the shop were what are known generally as "running repairs", rather than general overhauling. (R., p. 87). In both cases, the engines were inert and incapable of locomotion because they were not fired up and particularly because some of the wheels had been removed. Likewise, in both cases plaintiffs were injured in transporting wheels of the locomotive which had been removed,— in the *Bezue* case, from the lathe where they had been turned to the pit where they were to be replaced on the engine, and in the present case, from the pit where they had been removed to the lathe to be turned and subsequently reapplied to the engine. In the *Bezue* case, plaintiff was injured on the ninth day, whereas, in this case, appellee was injured on the seventh day that the engine was in the shop.

It is significant that in the *Bezue* case, the court did not feel that it was necessary to dis-

cuss the use to which the locomotive was ordinarily put while in service, that is to say, whether exclusively in interstate commerce or indiscriminately in intrastate and interstate commerce. Under the reasoning of the court, that fact was immaterial, and the decision would have been the same even though it had appeared that the engine when in use was used exclusively in interstate service. The significant facts were not the character of the use of the engine while in service, but rather, the manner and purpose and time of its withdrawal from all service.

In denying appellant's motion to dismiss, made at the opening of the trial, the court apparently rested its conclusions upon two facts—first, that the engine was one used in interstate commerce, had been so used immediately before going to the shops, and was intended to be returned to that use, and second, that the wheels were being moved *away from* the engine to the machine shop, whereas in the *Bezue* case, the wheels were being moved from the lathe after completion of the work *to* the engine. (R., pp. 21-22).

The authorities cited indicate that the first of these two grounds does not justify the conclusion

of the trial court. In *Industrial Accident Commission v. Payne, supra*, the engine "had been employed in interstate commerce and . . . . was destined to be so employed again." Nevertheless, it was held that the repairman was not engaged in interstate commerce. The mere fact that an engine, while in use, is used exclusively in interstate service, is not sufficient to bring an employee who is engaged in repairing it within the provisions of the Federal Act. Much less does the mere fact that the last use before the accident, and the first use following the accident, were in interstate commerce, support the court's conclusion. *Minneapolis & St. Louis R. Co. v. Winters, supra.*

In fairness to the trial court, it should be noted that the grounds on which it acted were stated when there were before it only the facts as to "customary" use of the engine, based on the stipulation, Exhibit 4. (R., pp. 20-22, 34-40). The court did not then have the evidence of use in intrastate commerce, later stated in the testimony of Witness Morrison. (R., pp. 79-81). Apparently the court made the same error as did the Circuit Court of Appeals of the Sixth Circuit in the

Kindlesparker case, upon which the text writer, hereinbefore quoted, commented.

Furthermore, the second ground upon which the court acted is likewise insufficient. If an engine is brought to the shop for service between two interstate runs and is not withdrawn from use except for that purpose, it may be that an employee who is engaged in work upon it is engaged in interstate commerce within the Act, under the principle applied in the *Marcone* case cited in the quotation in preceding pages from the *Bezue* case. On the contrary, if the engine is brought in for repairs of the nature shown in the *Bezue* case and in this case, and is withdrawn from all service as was done here, then a repairman is not within the Act; and that is true whether the accident happens five minutes after the engine is definitely withdrawn from service or five minutes before it is definitely replaced in service. In the present case, as soon as it was determined that repairs were to be made of a nature constituting a withdrawal from service, the engine was at that instant withdrawn from service and any injury to an employee after that moment could not be within the act.

It is difficult to see how, in the *Bezue* case, the court could have reached a different conclusion if the facts had shown that the plaintiff was injured in moving the wheels *away* from the engine on the seventh day after withdrawal from service (which is the fact in the case at bar) instead of while moving the wheels *back to* the engine on the ninth day. If there could be any possible distinction arising from that fact, it would seem that the facts in this case more strongly support the conclusion that the appellee was not engaged in interstate commerce than the facts in the *Bezue* case. In the present case, the act of taking an essential part *away* from the engine tended to make the engine, to that extent, less capable of furnishing transportation service; whereas, in the *Bezue* case, the act of taking some part *to* the engine to attach it tended to make the engine, to that extent, more nearly capable of rendering transportation service.

Upon the authority of the *Winters* case, as interpreted in subsequent decisions of the Supreme Court, and particularly upon the authority of the *Bezue* case, the conclusion is inevitable that the appellee, at the time of the injuries of which he complains, was not engaged in interstate com-

merce within the meaning of the Federal Employers' Liability Act.

There have been several decisions of the lower federal courts applying the principles controlling this action. The cases, of course, are widely variant in their facts, but the principles are the same. There are many decisions relating to repairs of equipment other than locomotives, but we have limited ourselves to citation of decisions involving repairs to engines.

For decisions of the lower federal courts, see *Connolly v. Chicago, M. & St. P. Ry. Co.*, 3 Fed. (2d) 818 (a decision of Judge Neterer of the District Court of Washington); *Baltimore & Ohio Railroad Co. v. Kast,* 299 Fed. 419 (6th C. C. A.), and *Chicago & Alton R. R. Co. v. Allen,* 249 Fed. 280 (7th C. C. A.).

The same question has been raised in several decisions of state courts. Thus, in *Chicago R. I. & P. Ry. Co. v. Cronin,* 74 Okla. 38, 176 Pac. 919, the facts showed that the engine upon which plaintiff was engaged was one which, when in service, pulled an interstate train. At the time of the repairs, the engine was in the shop and was "dead". The repairs were completed in time for the engine to

make its next regular trip from Sayre, Oklahoma, to Amarillo, Texas. The court held that plaintiff was not engaged in interstate commerce. Another case, reaching the same conclusion, is *Larkin v. Industrial Commission of Utah*, 60 Utah 274, 208 Pac. 500, wherein it was shown that the engine on which plaintiff was making repairs was used exclusively in interstate commerce. Another case is *New Orleans & Northeastern Railroad Company v. Beard*, 128 Miss. 172, 90 So. 727. (Certiorari denied 260 U. S. 752, 43 S. Ct. 10). There the engine was one of a group of five purchased by defendant for the sole purpose of use on interstate runs. Four of the group were constantly in use and one was usually in the shop. Again it was held that plaintiff was not engaged in interstate commerce. In *Detroit & T. Shore Line R. Co. v. Seigel* (Ohio App.), 153 N. E. 870, the engine was in the shop for six days for a washout and repairs. It was used before and after shopping in interstate commerce. The Ohio court held that plaintiff was not within the Act. In *Chesapeake & Ohio Railroad Co. v. Mizelle*, 136 Va. 237, 118 S. E. 241, the engine was an extra passenger engine which, when in use, was used on regular interstate trains. It was held that plaintiff was not within the Act. In

Conklin v. New York Central Railroad Company, 206 App. Div. 524, 202 N. Y. S. 75 (affirmed 238 N. Y. 570, 144 N. E. 895; certiorari denied 266 U. S. 607, 45 S. Ct. 93), the engine was last used before plaintiff's accident on an interstate run, but was generally used indiscriminately within the state on interstate and intrastate trains. It was in the shop for five days for repair of tires. It was held that plaintiff, while engaged in work on that engine, was not within the Act.

Since the only ground relied on for the exercise of jurisdiction by a federal court in this case is that the case arises under the Federal Employers' Liability Act, and since, from the uncontroverted facts, it appears that plaintiff was not engaged in interstate commerce within the Act, the judgment in this case should be reversed, with directions to dismiss the case without prejudice for want of jurisdiction.

II.

Failure of the Court to Direct a Verdict for Appellant.

The third specification of error goes to the merits of the case. Therein appellant asserts that

the trial court erred in overruling appellant's motion for a directed verdict made upon the ground, among others, that appellee's injuries resulted from risks of the employment assumed by him.

The asserted ground of federal jurisdiction is that appellee was engaged in interstate commerce at the time of the accident and had a cause of action under the Federal Employers' Liability Act. Assuming the existence of such a cause of action, any defense available under the Act was open to appellant.

In a case under the Act, the employee cannot recover if the injury resulted from a risk of the employment assumed by him. The Act has been construed on many occasions by the Supreme Court and it has been held uniformly, with exceptions not now applicable, that the Act left intact the common law defense of assumption of risk. *Seaboard Airline Railway Company v. Horton*, 233 U. S. 492, 34 S. Ct. 635; *Missouri Pacific Railroad Company v. David*, 284 U. S. 460, 52 S. Ct. 242.

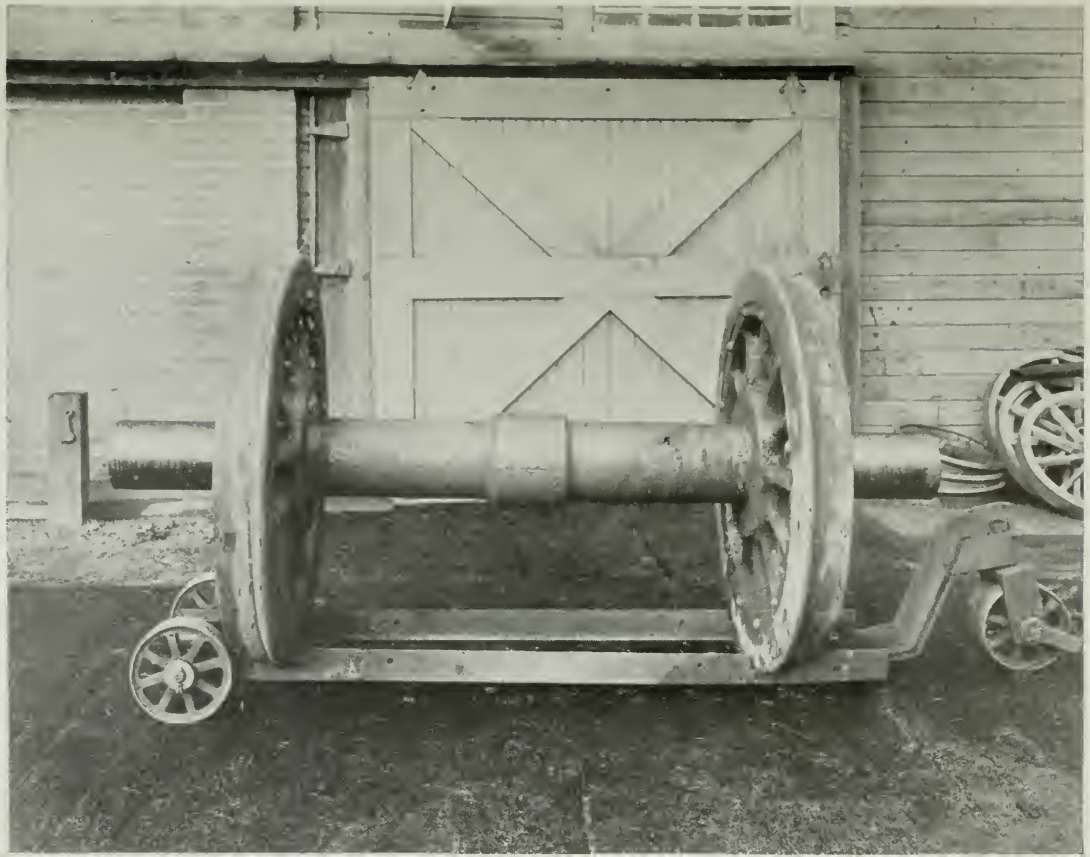
All ordinary risks of a particular occupation are assumed by the employee. Likewise unusual and extraordinary risks are assumed when the existence of the risk is known to the employee or

should be known to him in the exercise of his ordinary powers of observation and he continues his work with that knowledge. Even though the risk is created by the negligence of the master, it is assumed by the servant who, with knowledge thereof, proceeds with his task. *Seaboard Airline Railway Company v. Horton, supra; Delaware & Lackawanna Railroad Co. v. Koske,* 279 U. S. 7, 49 S. Ct. 202; *Toledo, St. Louis & Western Railroad Company v. Allen,* 276 U. S. 165, 48 S. Ct. 215; *Columbia & P. S. R. Co. v. Sauter,* 223 Fed. 604 (9th C. C. A.); *Chicago, M. & St. P. Ry. Co v. Busby,* 41 Fed. (2d) 617 (9th C. C. A.).

For our present purposes, we will assume that appellee's account of the accident and its surrounding circumstances is correct. There were several conflicts in the testimony as given by appellee and his witnesses and by appellant's witnesses. In this brief, all testimony which conflicts with that of appellee, or of witnesses called by him, will be disregarded. Based solely on the testimony of the appellee and his witnesses, it will appear, we submit, that appellee assumed the risks of the injuries of which he now complains.

Appellee was injured in appellant's roundhouse at Vancouver, while engaged with others of a crew of workmen in moving a pair of engine wheels loaded on a steel truck. Four photographs, defendant's Exhibits A-1 to A-4, inclusive, show the truck and the manner in which the wheels were loaded thereon. (R., pp. 41 - 42). Plaintiff's Exhibit 1 is a wooden model of the truck and the trailer wheels. (R., p. 40). These exhibits, the photographs and the model, are a part of the record on this appeal by stipulation of counsel and order of the trial court. (R., pp. 113-115). For convenience, the four photographs are here reproduced.

Defendant's Exhibit A-1



As the detailed summary of the evidence will show, appellee voluntarily took a position between the front and the rear of the two trailer wheels. He stood immediately in front of the rear wheel and was injured when the wheel was moved forward as the result of the combined efforts of members of the crew. As will appear, the situation is precisely the same as though appellee had stood between the front and rear wheels of a wagon, had exerted his efforts to move the front wheel and was struck and injured by the rear wheel which necessarily moved simultaneously with the front wheel. In those circumstances the danger of being struck by the rear wheel was open and apparent, and, as a matter of law, was assumed by appellee.

The crew which was engaged in moving the truck included seven or eight men. (R., p. 43). One or two men were holding the tongue of the truck. One or two men were at the rear end of the truck pushing against the rear of the two trailer wheels. (R., p. 44). Appellee and another were pushing on the forward of the two trailer wheels, one on each side of the axle. Appellee was on the right side of the axle and the other workman was on the left side of the axle. (R.,

pp. 53, 56). Appellee, then, was between the front and rear trailer wheels, walking along pushing on the forward of the two wheels. The roundhouse foreman, Morrison, was accompanying the loaded truck. (R., pp. 44, 45).

As the truck was being moved over the plank floor of the roundhouse, because of the small clearance between the floor and the bottom of the channel iron forming a part of the truck, the bottom of the channel iron encountered an irregularity in the floor and the truck was stopped. (R., p. 44). Appellee was directed by the foreman to procure a crowbar to use to dislodge the truck. (R., p. 44). Appellee got the bar and attempted to pry by placing the bar under the forward trailer wheel. (R., p. 46). While in a position first assumed by him, he tried to pry once or twice, but was unsuccessful in dislodging the truck because his bar slipped on the tire of the trailer wheel. (R., p. 46). Without any further direction from the foreman, appellee took a different position. (R., p. 46). He assumed a position immediately between the two trailer wheels on the right side of the axle, facing the forward trailer wheel. His back was against the axle and he was facing somewhat away from the axle. (R., p. 53). His left

foot was forward. His right foot was approximately 24 inches back of his left foot and his rear foot was "pretty close to four feet from the flange of the forward wheel". (R., pp. 53-54). The bar was in front of him, with the result that his body was between the crowbar and the axle of the trailer wheels. (R., p. 53).

The distance between the trailer wheels to the outside of the flanges was four feet eight and one-half inches, and the distance between the inside of the flanges was four feet six inches. (R., p. 54). Necessarily, since his rear foot was "pretty close" to four feet from the flange of the forward trailer wheel, it was then "pretty close" to six inches from the rear wheel. That his rear foot was very close to the rear wheel which later struck him, becomes apparent to anyone who will conduct the experiment of placing himself in a restricted space, only four and a half feet wide, and in a position to handle a crowbar six feet long. (R., p. 54).

While in that position he inserted the point of his bar under the forward trailer wheel and raised on the bar to dislodge the truck by lightening the load on the truck to increase the clearance between the truck and the floor. (R., pp. 46, 47). At the same time other members of the crew at the rear

of the truck and at the forward wheel on the opposite side of the axle from appellee were pushing to move the cart forward. (R., pp. 55, 56). The crew was successful in dislodging the truck and it moved forward. Appellee's right foot, being within a few inches of the rear trailer wheel, was struck by it when the truck moved forward, and appellee was injured. (R., pp. 46, 47).

The complaint alleges in effect that the truck was defective because it had sprung so that one side had a clearance above the floor of no more than half an inch. (R., p. 5). It alleges further that the plank floor was worn and decayed and was rough and uneven and "knots were sticking up" and further, in order to bring the planks even with the top of the rails of a track, the ends of the planks next to the rails had been hewn or beveled so that there was an incline on the decking running toward the rails. (R., pp. 3-4).

The negligence specifically charged to the appellant consisted of the following:

1. The method adopted for moving the trailer wheels was unsafe due to the condition of the truck and the plank decking.

2. After the truck had become "caught" appellant should have directed the use of four crowbars to pry the trailer wheels forward and should have directed four men thus equipped to work in unison.

3. Appellant was negligent with respect to the state of maintenance of the truck and of the decking.

4. Appellant's foreman should have warned the appellee of the danger of the truck moving forward down the incline.

5. Appellant's foreman should not have directed appellee to work in the position in which he was at the time of the accident. (R., pp. 8-9).

These charges of negligence can be grouped under the following headings:

1. Charges relating to the condition of the truck and the condition of the floor.

2. Charges relating to the method adopted to dislodge the truck and to get it in motion after it had stopped.

3. Charges relating to the failure of the foreman to warn appellee of danger and to the instructions as given by the foreman.

We submit that if there were any negligence in the respects charged, the risks resulting therefrom were open and apparent and were known to appellee, or should have been known to him in the exercise of his ordinary powers of observation, and were assumed by him when he continued with his work.

A. Charges of Negligence Relating to the Condition of the Floor and of the Truck.

In the first place, it is obvious that the condition of the floor and of the truck had nothing to do with the accident. Appellant's conduct in this respect. even though negligent, was not a proximate cause. Negligence which merely created a condition in which appellee acted was not the proximate cause of the accident. The condition of the floor and of the truck, at the most, caused the truck to become stalled as it was moved across the floor, but after the truck became stalled, there was no danger to the appellee or other members of the crew until some further act was performed. The truck could have remained in the stalled condition indefinitely and no one would have been injured. The accident occurred only as a result of the

intervening acts of appellee himself and other members of the crew in their efforts to dislodge the truck. It is held uniformly that negligence which merely creates the condition is not the proximate cause of an accident. *O'Connor v. Brucker,* 117 Ga. 451, 43 S. E. 731; *Curran v. Chicago & W. I. R. Co.,* 289 Ill. 111, 124 N. E. 330; *Fraser v. Chicago R. I. & P. Ry. Co.,* 101 Kans. 122, 165 Pac. 831; *Bohm v. Chicago, M. & St. P. Ry. Co.,* 161 Minn. 74, 200 N. W. 804, (Cert. denied, 267 U. S. 600, 45 S. Ct. 355); *Davis v. Carolina Cotton & Woolen Mills Co.,* 5 Fed. (2d) 575; *Saunders v. Boston & Maine R. Co.,* 82 N. H. 476, 136 A. 264; 45 Corpus Juris 931.

But even if it could be contended that the condition of the floor and of the truck was a proximate cause of appellee's accident, nevertheless appellee cannot recover because the risks created thereby were well known to appellee and he assumed them when he proceeded with his work with that knowledge.

To demonstrate that appellee was aware of the risks thereby created, we shall summarize his own testimony on this subject. On direct examination he testified substantially as follows:

". . . The state of repair of the planking was very poor. The planking has knots along it, quite a few knots, and then they use pretty good sized spikes to drive that down, and there are places from dragging such things as the truck over the floor where the floor was wore down and these knots stick up and then some of the nails stick up and bend over where you run into them." (R., p. 42).

"When the truck was empty, the distance from the channel iron to the floor was around an inch. When it was loaded, one side was lower than the other because it was sprung out of shape on this side where it was cut. After the truck was loaded, I could not say exactly the distance between the channel iron and the floor, but it was probably around a half inch . . ." (R., p. 43).

On cross examination he testified as follows:

". . . I knew for a long time that the floor was rough from the movement of heavy machinery over it, and I had seen these bumps in the floor caused by knots in the plank many times, and I had seen these places where nails were sticking up in the floor many times before this accident happened." (R., p. 49).

"Q. It was not very much about that plank flooring that you did not know about, was it? You knew things fairly well before this thing happened, didn't you?

A. Yes, I knew the condition of it." (R., pp. 49-50).

"The accident happened near the time clock. I had to go to the time clock at various times of the day to punch the clock, and I had been

> over the floor near the point where the accident happened on many occasions on each of the prior days. I had had plenty of opportunities to learn the condition of the floor. I had gone over that part of the floor where this slope was located a good many times. I had walked across it, and if I had glanced down at the floor I would have noticed the condition of the floor at that point. There was nothing concealed or hidden. The condition was right on the surface of the floor." (R., p. 50).

The fact that the floor was rough and uneven and the fact that the truck was constructed with very little clearance had nothing to do with the occurrence of the accident except as the combination of the two circumstances caused the truck to become stalled as it was being moved over the uneven floor. The condition of the floor and of the truck created no hazard except as the two circumstances increased the tendency of the truck to stall when it encountered some protuberance or interference.

But this tendency of the truck to stop as it was being moved over the floor because of the combination of the two circumstances was well known to the appellee. He testified as follows:

> "I had worked on many occasions moving wheels on this truck, and pretty close to every time we moved it, the truck got stuck some

> place along the floor, and I knew when I began to move the truck that it was liable to stick somewhere along the floor, and that was the customary experience in using the truck, and I had all of that knowledge prior to the time that we started moving the truck at the time of the accident. But I was never stuck in that particular place, but it had stuck in numerous other places along there. It stuck at numerous other places around the roundhouse floor, and I knew all of that before the accident happened on April 22, 1932." (R., p. 53).

Here, then, is positive testimony from the appellee himself that prior to the accident he was fully aware of two facts, first, the condition of the truck and of the floor, and second, the probability that what did happen, would happen, that is, that the truck would be stalled because of the small clearance. In many cases an employee may be aware of a condition which creates a hazard, but does not fully appreciate the particular form in which the hazard will exhibit itself, and it is nevertheless held that he assumes the risk. The present case is a stronger one because appellee knew the precise condition which created the hazard, and likewise, the precise manner in which the hazard would become operative.

The remaining point, with respect to the condition of the floor, involves the fact, to which ap-

pellee testified, that at the particular location where the truck stalled on this occasion the floor was sloping so that while the rear wheel of the truck was on the level, the front wheel of the truck was on an incline. As a result of this, so he states, when he and the other workmen engaged with him dislodged the truck to move it forward, the forward end moved down the "little slope" and the loaded truck moved forward a distance greater than appellee anticipated. (R., pp. 46, 55, 58).

The trailer wheels which were being moved weighed over two tons. (R., p. 41). About seven or eight men were engaged in the work. (R., p. 43). As appellee used the crowbar to dislodge the truck after it was stalled, other members of the crew were exerting their efforts by pushing to assist in dislodging the wheels to move them forward. (R., pp. 52, 55, 56). Appellee testified:

> ". . . When I raised up on there, the cart shot ahead. Ordinarily when I would use a bar it would move probably the length of the bite I had, just get off the bar and then stop, but at this particular place, there is a little slope there where it goes down to the tracks, and where the rail comes through there, and I may be behind the wheels when I was coming along there pushing, I was not paying any attention

to what was ahead of it because we never moved fast enough to run over anything, . . ." (R., p. 46).

But the appellee knew of the existence of this slope in the floor. He testified:

". . . I had gone over that part of the floor where this slope was located a good many times. I had walked across it, and if I had glanced down at the floor I would have noticed the condition of the floor at that point. There was nothing concealed or hidden. . . ." (R., p. 50).

He testified further on cross examination:

"Q. But, despite the fact you walked by them many times each day, you never noticed it sloped until after the accident, had you, is that right?

A. Well, before—just walking along there, you would notice it every time, but this cart at this time, and the wheels on it, you could not notice, or I did not notice it.

Q. Well then, your answer is, standing behind this wheel you forgot that slope, isn't that about it?

A. I was busy working. I was not looking for any slope.

* * * * *

Q. So, that you knew the slope was there, but you could not see it from the position in which you were standing when you were working on the wheels at this time, that is correct, is it not?

A. Yes, sir." (R., pp. 50-51).

However, on recross examination he admitted that as he stood two or three feet from the forward trailer wheel, there was nothing to prevent his seeing the floor where it sloped on the other side of the wheel. (R., pp. 59, 60). That this was true is apparent from a glance at the photographs of the loaded truck, particularly Exhibit A-1, reproduced in earlier pages.

In the first place, it is very difficult to understand how a truck with wheels of a diameter of approximately six inches (R., p. 52), loaded with the trailer wheels weighing over two tons, with the rear wheels of the truck on level floor, could have been started so suddenly on a rough plank floor that the truck would "shoot" forward. The inertia of the load would make it physically impossible for the truck to be moved suddenly, irrespective of the man-power being used to start it forward; but we will not take advantage of that point because we are arguing here upon the assumption that the appellee's testimony is correct in every respect.

Appellee knew that the slope was there. He knew further that the very purpose of his own action and the actions of all of the members of

the crew was to get the truck in motion. His own witness testified that when the truck stalled the efforts of the crew were exerted "to get it moving and keep it moving". (R., p. 69). The witness stated:

> ". . . That is the way it is usually done when the car stuck, we would all push on it and keep it moving; so that it was usual, after the truck was stuck on the floor, to keep it moving straight along if we could." (R., p. 69).

Necessarily, appellee with his own previous experience with the truck appreciated that obvious fact. He knew that the efforts of the crew were being exerted for that very purpose. Consequently, he knew of the risk or hazard created by moving the truck forward.

No individual of mature years is unaware of the effect of the law of gravitation. Every individual knows that water runs down hill. Likewise, every individual knows that a wheel started forward on a slope has a tendency to roll down hill. Consequently, if appellee knew of the existence of the slope, it is certain that he was aware of the risk or hazard created by an attempt to move the truck forward toward the downward slope, when his foot was only six inches in front of the rear wheel.

With the knowledge which appellee had of the purpose of the efforts of the crew and with the knowledge which he freely admits of the existence of the slight slope in the floor, it follows inevitably that he assumed the risk of the accident in so far as it resulted from the existence of the slope in the floor.

B. Charges of Negligence Relating to the Method Adopted to Dislodge the Truck and to Get it in Motion After it Had Become Stalled.

The charges of negligence under this second general heading include:

1. The charge that appellant, after the truck had become "caught" should have directed the use of four crowbars to pry the trailer wheels forward, and should have directed four men thus equipped to work in unison.

2. The charge that appellant's foreman should have warned appellee of the danger of the truck moving forward down the incline.

3. The charge that the foreman should not have directed the appellee to work in the position in which he was at the time of the accident.

In the first place, appellee's testimony already quoted, showed that he had worked many times in moving this loaded truck. His own witness in the testimony quoted above, describes the "usual" method whereby the crew "pushed" to get the truck in motion. If the operation would have been safer if four men had used crowbars (and we submit that there is absolutely no evidence that four men equipped with crowbars would have been safer than four men pushing), it is nevertheless apparent that appellee was familiar with the usual practice to have men push, and assumed the risk thereof.

Where an experienced employee is injured in an operation carried on by the usual and customary method, even though the method adopted may be negligent, he assumes the risks inherent in the use of the method. *Toledo, St. L. & W. Ry. Co. v. Allen,* 276 U. S. 165, 48 S. Ct. 215; *Dibble v. N. Y., N. H. & H. R. Co.,* 100 Conn. 130, 123 Atl. 124; *Cin., N. O. & T. P. Ry. Co. v. Brown,* 158 Tenn. 75, 12 S. W. (2d) 381; *Holz v. Chicago, M., St. P. & P. Ry. Co.,* 176 Minn. 575, 224 N. W. 241; *Louisville & N. R. Co. v. Stewart's Admr.,* 207 Ky. 516, 269 S. W. 555.

There was no duty to warn appellee of a danger of which he was already aware. It is

immaterial how he acquired that knowledge, whether by previous instructions, previous experience, or his own ordinary powers of observation. And there was no duty upon the master to warn of danger if the servant's opportunity to learn of it was equal to the opportunity of the master. *Baltimore & Ohio R. Co. v. Berry*, 286 U. S. 272, 52 S. Ct. 510; *Broughton v. O. W. R. & N. Co.*, 138 Wn. 298, 244 P. 558; *Hopkins v. S. P. & S. Ry. Co.*, 137 Or. 287, 298 P. 914, 2 P. (2d) 1105; *Traffic Motor Truck Corp. v. Clagwell*, 12 Fed. (2d) 419; Labatt, Master and Servant (2d ed.), Secs. 1143, 1144; 39 Corpus Juris 499. And by the fundamental principles of assumption of risk, if there is no duty upon the master to warn of a particular danger because the servant has full knowledge thereof, the servant assumes the risks thereby created.

Appellee's testimony is to the effect that after the truck stopped, he received orders from the foreman to get a bar to use to dislodge the truck. Appellee testified:

> ". . . As near as I can remember, he said, 'Martin, get that bar and put it under the wheel and raise up on it and see if you can get that raised off that high place' ". (R., p. 45).

He proceeded to get a bar which was standing nearby. He testified further:

> "After I got the bar, the foreman did not give me any orders to the use of it after I got over to the truck, he just told me in the first place to take the bar and put it under the wheel and see if we could raise it up." (R., p. 45).

He testified further on direct examination:

> "After I got the bar I put it under the wheel and raised up on it, and the flange is slick on those wheels, smooth and slick, wore that way. They were worn off too much to run on the track any more, and this bar would slip up around the edge of the flange, and so when the bar slipped up, I tried it there a couple of times, and when it slipped up, I moved over so that I could get a hold on it where it would not slip up the side of it, and I did move around next to the axle and got a hold of it and raised up. It slipped off about twice, as I remember. After it slipped off, I did not receive any additional orders from my foreman . . ." (R., p. 46).

On cross examination he testified on the subject of instructions as follows:

> "The only instructions that Morrison gave me were before I got the bar, and after I got the bar, I tried at least twice to pry from a position different from that which I used at the time of the accident. Morrison did not tell me about changing positions. He told me to pry, to put it under and pry." (R., p. 56).

It is apparent from the testimony of the plaintiff himself, then, that the method which he adopted at the time of the accident was of his own selection, that Morrison, the foreman, did not instruct him to take the position which he assumed at the time of the accident, but that he voluntarily placed himself in this place of danger between the wheels without any instructions from the foreman.

It is further apparent from his own testimony that he knew or had the opportunity to know of the danger of taking a position so close to the rear of the two trailer wheels when he knew that the other members of the crew were exerting their efforts to move the wheels forward. He testified on cross examination as follows:

> ". . . At that time I knew that other members of the crew were pushing on the wheels to move it off this place, and I knew that men were in back of me pushing to move it forward, and I knew that when I took my position with the bar, and I expected the wheels to be moved forward to a certain extent, and I knew that that was what the other members of the crew were trying to do, and it did not surprise me at all when that back wheel moved forward in my direction." (R., p. 55).

He testified further:

> ". . . There were seven or eight men working on the job. I could not tell how many men were

on the back, but so far as I knew, everybody was on the job doing as they were supposed to do, and the job of everyone was to move the truck forward." (R., p. 56).

He testified on redirect examination:

". . . At the time the car moved, I knew that there had been a good many men pushing on it with their hands . . ." (R., p. 58).

No warning which could have been given to him by the foreman would have added to the knowledge which appellee already had. There was no negligence on the part of the foreman in directing the appellee to take the position which he assumed at the time of the injury, because of the simple fact that the foreman did not order appellee to take the position which he did. Appellee selected his own position and took it voluntarily without any orders or directions from the foreman.

The facts are simple, and the conclusion that appellee assumed the risk is obvious. Without any instructions from his foreman, he voluntarily placed himself immediately in front of the rear of the two trailer wheels, with full knowledge of the fact that the efforts of seven or eight men were to be exerted at once to move the rear wheel forward in his direction. If a man voluntarily

stands in the path of an object which he knows is to be immediately moved in his direction, he knows that he may be hit, and if the object is heavy, he knows that he may be injured. If he remains in that position until the object reaches him, he assumes the risk of being so injured. There is no difference in principle between this case and one where a man takes a position in the street with his back to approaching vehicles with full knowledge of the fact that vehicles will be operated over the road and over that very portion of the road in which he is standing. A more obvious case of assumption of risk is difficult to imagine.

C. Representative Decisions Involving Similar Facts

In the opening pages of the discussion of this assignment of error we have cited decisions of the Supreme Court of the United States to the effect that the Federal Employers' Liability Act left the defense of assumption of risk as it was at common law. It remains only to cite some additional cases wherein under facts similar to those now before the court the courts have held that an employee assumed the risk.

In this case appellee's own testimony shows

that he voluntarily placed himself in the path of an object which he knew was to be presently moved, and was struck by that object when it was moved. Appellee's position was substantially the same as that of a person who stands between the front and rear wheels of a wagon, pushes the front wheel to move the wagon, and is struck by the rear wheel which necessarily moves simultaneously with the front wheel. We have found no case in the recorded decisions in which an employee thus sustaining an injury sought to hold his employer liable.

However, there are several cases where the courts have held that the servant assumed the risk of being struck by a moving object where the facts were far less favorable to the master than those in the case at bar.

In *Hunt v. Missouri Pacific Railway Company,* 123 Kan. 346, 255 Pac. 70, plaintiff and another employee were engaged in moving pairs of wheels along a dummy track to a point where they were to be loaded by derrick to a flat car. The method adopted was for each man to handle one pair, roll it to the point where it was to be lifted, and then, both working together, to place the derrick

chains on a particular pair of wheels. Plaintiff was handling one pair and his associate was following him on the track with another pair. The only position of danger was astraddle the rail where the flanges of the wheels would strike. There was no danger between or outside the rails. Plaintiff, with his back to the second pair of wheels, straddled the rail and was injured when the pair following, released by the other employee, struck the pair being handled by plaintiff. The court held that since plaintiff was familiar with the method being used and with the fact that the wheels behind were being moved, the danger was open and obvious and plaintiff assumed the risk. A judgment for plaintiff was reversed with directions to dismiss.

The present case is even stronger in support of the defense of assumption of risk. Here appellee not only knew that other employees were engaged in pushing the truck forward, but appellee himself was engaged in the effort to move the wheels, which necessarily involved movement of the rear trailer wheel against his foot.

In *Anderson v. Svehla,* 126 Neb. 584, 253 N. W. 863, plaintiff, an employee of defendant railroad company, was engaged with others in lifting a

heavy freight car bolster to put it in place in a freight car being repaired. The bolster was held up by a jack near the center, which acted as a fulcrum. As other members of the crew raised one end, the opposite end, held by plaintiff to steady it, was lowered and plaintiff was injured. The court held that since plaintiff was familiar with the method being used and since the risks inherent in the method were obvious, plaintiff assumed the risks.

The physical phenomenon of the "see-saw" in the case cited produced risks no more obvious than the danger of standing in front of the rear trailer wheel while attempting to move the truck by pushing on the front wheel.

In *Broughton v. Oregon-Washington Railroad & Navigation Company,* 138 Wn. 298, 244 Pac. 558, an action under the Federal Employers' Liability Act, plaintiff's decedent was killed when he fell from a scaffold while engaged in repairing a bridge. The scaffold was suspended from the side of a pier and its own weight held it against the pier. As cross pieces of the floor of the scaffold were being removed by decedent and another, the scaffold swung against the pier and the decedent

was knocked off. The court held that decedent assumed the risk.

Again, the tendency of a suspended object to act as a pendulum is no more apparent than the tendency of the rear wheel to move forward in the circumstances of this case.

In *New York, C. & St. L. Railroad Company v. May,* 95 Ind. App. 384, 164 N. E. 288, a case under the Federal Act, plaintiff, an experienced section hand, was injured when a telegraph pole being transported on a handcar rolled and struck plaintiff. It was held that he assumed the risk of injury from the rolling of the pole.

Again, the tendency of a round pole to roll when disturbed is no more apparent than the tendency of all wheels of a cart to move when one wheel is pushed.

In *Pennsylvania Railroad Co. v. Brubaker,* 31 Fed. (2d) 939 (6th C. C. A.), plaintiff was working on the handle of an ordinary two-wheel freight truck. Other employees raised a crate to permit plaintiff to insert the plow of the truck under it. As the crate was suddenly lowered, it struck the raised plow and the sudden movement injured

plaintiff. It was held that the risk of injury was assumed by plaintiff.

Again, the tendency of the handles of a truck to move when the plow is struck is no more apparent than the tendency of all wheels of a truck to move simultaneously.

There is a long line of cases in the federal and state courts wherein it has been held that an employee who goes under or about railroad cars or upon or close to tracks when he can anticipate that cars will be moved or trains operated, assumes the risk of injury resulting from the movement of cars and trains. We cite only a few of the representative cases in the federal courts:

Toledo, St. Louis & Western Railroad Co., v. Allen, 276 U. S. 165, 48 S. Ct. 215;

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495;

Pennsylvania Railroad Co. v. Bourke, 61 Fed. (2d) 719 (6th C. C. A.);

Biernacki v. Pennsylvania Railroad Co., 45 Fed. (2d) 677 (2nd C. C. A.);

Norfolk & Western Railway Co. v. Collingsworth, 32 Fed. (2d) 561 (6th C. C. A);

Flannery v. N. Y., O. & W. R. Co., 29 Fed. (2d) 18 (2nd C. C. A.);

Kemmerer v. Reading Company, 16 Fed. (2d) 924 (3rd C. C. A.).

These cases, while not close in point of fact, are precisely the same in principle as the case at bar. If an employee voluntarily places himself in the path which he knows a moving object is presently to take, he assumes the risk of injury which results from the movement of that object.

If appellee was engaged in interstate commerce so that the District Court had jurisdiction of this cause, we submit that on the merits the judgment should be reversed and the case remanded with directions to dismiss. The court should have granted appellant's motion for a directed verdict because appellee assumed the risk of injury as a matter of law. This conclusion follows necessarily from an analysis of the facts and an application to the facts of the principles uniformly applied by federal and state courts.

III.

Failure of the Trial Court to Give to the Jury Instructions Requested by Appellant.

In specifications of error Nos. 4 to 7, inclusive, appellant asserts that the trial court erred in refusing to give the jury four instructions to with-

draw from their consideration certain charges of negligence.

If this court determines, as we believe it must, that appellant's motion for a directed verdict should have been granted, there will then be no occasion to consider the errors assigned of the refusal to give the specific instructions now under discussion. However, if the judgment is not reversed with directions to dismiss on either the jurisdictional ground or on the ground that appellant was entitled to a directed verdict, appellant is still entitled to a reversal if any one of the four specific instructions was improperly refused.

A. Specifications of Error Nos. 4 and 6.

In the two requested instructions, the subject of these two specifications of error, appellant requested the court to withdraw from the jury the first and third charges of negligence stated in the complaint. (R., p. 8). These two charges, though phrased somewhat differently, both ascribe to appellant negligence with respect to the condition of the roundhouse floor and the truck being used to transport the trailer wheels.

In substance the instructions requested stated

that the risks and dangers which arose from the condition of the floor and the truck were known to appellee and that he assumed those risks.

We need not repeat here the testimony quoted in the course of our discussion in earlier pages of the question of assumption of risk. Appellee's own statements show that he was fully advised of the hazards created by the condition of the floor and the truck. The testimony discloses without question that appellee assumed those risks. The jury should not have been permitted to base a verdict for appellee on the charges of negligence relating to those conditions.

B. Specification of Error No. 5.

In this specification we assert that the court should have given the requested instruction to withdraw from the jury the second charge of negligence in the complaint. (R., p. 8). Therein appellee charged that defendant should have directed four men to use crowbars to dislodge the truck after it had stalled.

Our argument in earlier pages shows that the method usually adopted when using the truck to transport wheels was in fact used on this particular occasion. Furthermore, the authorities we

have cited establish that an experienced employee assumes the risks necessarily attendant upon a customary method with which he is familiar.

Again, whatever the disposition by this court of other assignments of error, the judgment must be reversed, because in no event should the jury have been permitted to base a verdict on appellee's second specification of negligence.

C. Specification of Error No. 7.

This specification relates to the refusal to withdraw from the jury appellee's fourth charge of negligence, the failure to warn appellee of the danger that the truck would move forward "down said incline", and the negligence in directing appellee to work in the position he assumed. (R., pp. 8, 9).

In the first place, as we have shown, the testimony of appellee failed to prove that he was directed to take the position in which he was working. He selected the position himself without any suggestion or direction from the foreman.

Furthermore, as has heretofore been shown, there is no duty upon the master to warn a servant of obvious dangers or of dangers of which he is

aware from information from any source. Consequently, a failure by the master to give a warning in such a situation is not culpable, and cannot be the basis for recovery by an injured servant.

The error in refusing to withdraw this charge of negligence from the jury is sufficient in itself to require a reversal.

CONCLUSION

Appellant respectfully submits that the district court was without jurisdiction of this action, because it appears clearly that appellee was not engaged in interstate commerce at the time of the injury complained of. The judgment should therefore be reversed and the action dismissed for want of jurisdiction.

Appellant further submits that no cause of action exists under the Federal Employers' Liability Act, if that statute is applicable at all, because appellee clearly assumed the risk from which his injury resulted. But if upon any theory it can be said that there was a jury question as to appellee's assumption of the risk, we think it clear that the trial court erred in refusing to give the instructions referred to in the Specifications of

Error, and that for this reason also the judgment against appellant should be set aside.

Respectfully submitted,

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